

# Five Variations of Transformative Law: Beyond Private and Public Interests

Poul F. Kjaer\*

## Abstract

The regulation of the interfaces of private and public interests is a central and recurrent issue of modern law. The centrality of the distinction and the manifold conceptual and practical problems associated with it has moreover been exacerbated over the past fifty years through the dominance of the twin-episteme of law constituted by law and economics and human rights law. Against this background, an alternative approach to and concept of law, transformative law, is briefly introduced. An approach which implies replacing the notions of private and public interests with the concepts of legally constituted public power and societal power. In order to analyse the potential and limits of transformative law, five legal phenomena, central to the other contributions to this special issue, are analysed: public interest litigation; legal mobilisation in the preliminary ruling procedure; bankruptcy proceedings; third-party litigation and the Meta Oversight Board.

**Keywords:** transformative law, private and public interests, societal and public power, human rights law, law and economics.

## 1 Introduction

The conference ‘The Public-Private Challenge: Innovating Legal and Regulatory Paradigms’ organised by Erasmus School of Law and the Faculty of Law of the University of Groningen explored the timely and crucial issue of the role of private actors in regulatory frameworks.<sup>1</sup> It is considered crucial because fifty or so years of rising influence of economic thinking and practice of the sort associated with structural liberalism, i.e. neo-liberalism, by now have had a profound imprint on the fabric of global society, including European and national societies. A sort of thinking and practice which in the legal domain are closely linked to law and economics though it cannot be exclusively reduced to law and economics. Rather, as we will return to, the dominant twin-episteme of law in the last fifty years has been law and eco-

nomics and human rights law. But also timely because this sort of thinking and practice seems to have been exhausted without an alternative episteme capable of taking its place. Hence, in spite of increased criticism, the legally constructed concept of the ‘private actor’ remains an essential component of regulation. As a legal concept, the ‘private actor’ is a Janus-faced concept both serving as the hanger for multiple critical interventions and as the indispensable point of departure or analysis. This is also visible in the contributions to this special issue, which by and large share the feature that they are critical towards the sort of power exercised by private actors while still endorsing the legitimate role of private actors in regulatory affairs.

Instigating the search for an alternative to the dominant twin-episteme of law and economics and human rights law, an alternative concept of and approach to law called transformative law is briefly introduced in what follows. A perspective which is conditioned upon a dismantling of the concepts of public and private power and their substitution with the concepts of legally constituted public power and societal power. Against that background, the remaining contributions to the special issues are analysed from a transformative law angle in order to contextualise them in the broader legal landscape. This, finally, leads to the suggestion that it is time to abandon the concepts of private and public interests.

## 2 The Idea of Transformative Law and the US-American Twin-Episteme

Transformative law departs from the premise that ‘society’ is at the centre of legal developments both as the focus point of legal regulation and as the ultimate source of law. One of several implications of this point of departure is therefore that a consistent and elaborated concept of and approach to law needs to be situated within the broader context of a general theory of society.<sup>2</sup> The societal focus of transformative law is moreover manifested in its core contra-factual normative orientation point concerning the establishment of a sustaina-

\* Poul F. Kjaer is professor at the Department of Business Humanities and Law, Copenhagen Business School. His research is funded by the European Research Council. Project: 101054237 – GLOBALVALUE. Contact: pfk.bhl@cbs.dk. Orcid: <https://orcid.org/0000-0002-8027-3601>.

1 <https://www.eur.nl/en/esl/news/conference-public-private-challenge-innovating-legal-and-regulatory-paradigms>.

2 P.F. Kjaer, ‘How to Study Worlds: Or why one should (not) care about methodology’, in M. Bartl and J.C. Lawrence (eds.), *The Politics of European Legal Research: Behind the Method* (2022) 208-222 at 219-20.

ble global society, in ecological, economic and social terms.<sup>3</sup> Hence, from the perspective of transformative law, the concept of sustainability, understood in its societal context, becomes the core concept of law, i.e. the overarching concept aimed at orchestrating the manifold other legal concepts which make up the fabric of law.

An episteme combines a conceptual knowledge dimension and a praxis dimension. In relation to both dimensions, transformative law differs from previous epistemes of law. When primarily observed from the knowledge dimension, at least four other epistemes of law can be observed historically. First, 'law as purpose' as most clearly expressed in the nineteenth century German Historical School of Jurisprudence, aimed at establishing law as a 'science' and the legal system as a rational deductive system characterised by conceptual coherency: a system entrusted with the task of establishing a coherent society through legal regulation. Hence, in this context, 'coherency' became the overarching contra-factual concept of law. Second, 'law as a tool' as manifested in the interwar 'turn to corporatism' conceptualising law as a lever for political projects, i.e. the realisation of political utopias such as those associated with anarchism, fascism, communism, National Socialism, reactionary Catholicism and socialism among other ideological strands each emphasising a particular group be it a religious congregation, revolutionary avant-garde, a social class or a 'race' granting the selected group an asymmetric position in society.<sup>4</sup> In this context, 'acceleration' became the overarching contra-factual concept of law, as the central task of law was to assist in accelerating the wheels of history, speeding up the realisation of whatever utopian vision law was subjected to. Third, 'law as an obstacle', associated with law and economics broadly speaking, where law and legal regulation is regarded an obstacle to market equilibriums emerging through spontaneous ordering or secondarily as the second-best option only to be invoked in case of market imperfections. The quest for 'market equilibrium' thereby became the core contra-factual orientation point and 'market equilibrium' the overarching concept of law; fourth, 'law as reflexivity-initiation', emphasising the central role of law as orchestrating self-regulation, i.e. making law's core task the regulation of self-regulation. Hence, instigating reflexivity in the manifold social processes unfolding in world society with the objective of enabling them to process the externalities they produce thereby becomes the central undertaking of law. From this perspective, 'reflexivity' therefore is the overarching concept of law.<sup>5</sup>

Switching the perspective from the knowledge dimension to a primary focus on the praxis dimension of legal epistemes, the dominant twin-episteme of law in the last fifty years has been law and economics and human rights law. The two approaches are seemingly very different in their normative orientations, but, nonetheless, share three central features. Firstly, in their current dominant versions, they are largely US-American in origin and as such reflect the cultural, economic and social fabric of US society and the particular problem constellations and conflicts inherent to that fabric. Secondly, conceptually, they are both methodologically individualist, considering the individual the central focus point of legal regulation. Thirdly, partly as a consequence of the methodologically individualist point of departure, they do not operate with a concept of society but rather with an aggregation of individual preferences or rights: law and economics with an aggregation of individual preferences and human rights law with an aggregation of rights. A concept concerning aggregation of individual preferences or rights is, however, not a concept of society but a concept of aggregation of individual preferences or rights.<sup>6</sup>

Outside the US context, the twin-episteme of law and economics and human rights has exercised a considerable influence by having been the most dominant form of legal transplantation in the last fifty years. In some jurisdictions, the influence has been massive, while in others, more superficial. In jurisdictions, such as the civil law jurisdictions of Continental Europe, where other approaches to law had been firmly established prior to the rise of the twin-episteme, a more superficial influence can be observed. Instead, previous epistemes remain firmly ingrained. That is most notably the case for the 'law as purpose' quest for legal coherency as the ultimate objective for the internal organisation of law but also for society as such. At the same time, the global economy and hence a substantial part of global society tend to rely on variations of US-American contract law, orchestrated by globally operating law firms, for the structuration of its exchanges, thereby de facto embedding national legal systems in a global law framework.<sup>7</sup> Hence, rather than being the constitutive elements of global society, states, understood as legally constituted institutional repositories of public power, are islands of public power floating in a global ocean of private power.

3 For a more comprehensive unfolding of the concept of transformative law see P.F. Kjaer, 'What is Transformative Law?', 1(4) *European Law Open* 760-780 (2022).

4 It is crucial to point here that 'law as an instrument' approaches came in both rule of law and none rule of law compatible as well as in democratic and non-democratic versions.

5 For a more comprehensive unfolding of the concept of transformative law see Kjaer (2022), above n. 3, at 763ff.

6 For more on the influence of US legal developments see P.F. Kjaer, 'The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law', 2(1) *Global Perspectives* 1-17 (2021).

7 D. Kennedy, 'Law in the Global Political Economy. Now You See It; Now You Don't', in P.F. Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law* (2020) 127-51.

### 3 Legally Constituted Public Power and Private/Public Interest

Max Weber defines power as ‘the possibility, in a social relationship, to impose ones will also against opposition’.<sup>8</sup> While the methodological individualist point of departure is central, the core element of interest here is ‘in a social relationship’ as the open-endedness implies that potentially, this can be the case in *any* social relationship. In a similar manner, Michel Foucault also made his name by seeing power, understood as *le savoir-pouvoir*, as intrinsic to *any* social relationship.<sup>9</sup> While power indeed is intrinsic to any social relationship, the expansive concepts of power deployed by Weber and Foucault downplay the private/public distinction and the difference between private and public power, as power is ‘everywhere’. Public power is, however, a particular form of power within the broader category of societal power, distinct because of five particular characteristics: first, abstraction – public power is constructed with the purpose of detaching the exercise of power from specific individuals and their particular interests;<sup>10</sup> second, acting as an alternative to particularistic interests, generality: public power is deployed based on a claim to be binding for *everyone* within a jurisdiction; thirdly, equality on the basis of the presumption that equal cases are treated equal; fourthly, particularness, i.e. public power is linked to concrete problem constellations and functions be it traffic rules or food safety standards; fifthly, non-retroactiveness, i.e. a structural orientation towards the future rather than the past on the basis of the linear concept of time.<sup>11</sup> Societal power, on the other hand, represents the anti-thesis of public power by being linked to specific individuals or groups of individuals, particularistic interests, patrimonialism, informal relations and a heritage- and reciprocity-bound, essentially, circular concept of time.

The five characteristics of public power above are legally constructed. They are legal categories, and it is through the legal form that public power becomes distinguishable from the broader phenomenon of societal power. This has two implications: first, rather than public power constituting law, it is the law that constitutes public power as a particular social phenomenon as it is the legal form that makes public power epistemologically ob-

servable as distinct from the wider category of societal power;<sup>12</sup> second, public power is, as already hinted at, ‘islands of power’, in the sense that public power floats in an ocean of societal power, i.e. the sort of power that is observable throughout society, ultimately world society.<sup>13</sup> It follows, that the concept of public power advanced here is the exact opposite of the Hobbesian concept where the body politic, i.e. the commonwealth, is assumed to encapsulate private power. Hence, the public/private distinction is rather a private/public distinction as non-public power is the broader category, just as a more concise conceptuality occurs by replacing the distinction between private and public power with a distinction between societal power and legally constituted public power.

### 4 Variations of Transformative Law

Armed with the above conceptuality, one might approach the five other contributions to this special issue, contextualising them in the dual context of forms of law from transformative law and the four preceding types of law and through the lens of the distinction between legally constituted public power and societal power.

#### 4.1 Public Interest Litigation

In his thorough and well-researched contribution, Ander Maglica provides a comparative study of public interest litigation in Europe. He starts out with the statement that

[p]ublic interest litigation aims to enforce through judicial proceedings not only the rights and interests of the individual claimants, but also those of the whole social group to which they pertain, if not the whole collectivity.<sup>14</sup>

The background is that from an empirical angle, Maglica argues, the abundance of formal individual rights granted often lack factual enforcement. That is, for example, the case in relation to freedom of expression, data protection, social and labour rights and non-discrimination in relation to race, sex, religion, political or sexual orientation. It is in this context that public interest litigation becomes a tool of social change for disadvantaged groups.

While underlining the ancient roots of the concept of public interest litigation, Maglica de facto zooms in on the influence of US developments on the European context, seeing the 1966 reform of the US class action mod-

8 M. Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, 5. Auflage (2002), at 28 (my translation, PFK).

9 D. Bellahcène, *Michel Foucault et le savoir pouvoir* (2012).

10 As such public power is also to be understood as inherently alienating as expressed in many anti-modernist or at least modernity critical positions such as those associated with, among others, Rousseau, Kierkegaard and Heidegger. P.F. Kjaer, ‘The Law of Political Economy: An Introduction’, in P.F. Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law* (2020) 1-30 at 7.

11 This is a condensed and simplified perspective. For ten dimensions of legally constituted public power see: P.F. Kjaer, ‘European Crises of Legally-Constituted Public Power: From the “Law of Corporatism” to the “Law of Governance”’, 23(5) *European Law Journal* 417-430 (2017) at 219ff.

12 *Ibid.*

13 P.F. Kjaer, ‘Global Law as Intercontextuality and as Interlegality’, in J. Klabbbers and G. Palombella (eds.), *The Challenge of Inter-legality* (2019) 302-318.

14 A. Maglica, ‘Public End through Private Means: A Comparative Study on Public Interest Litigation in Europe’, 16(2) *Erasmus Law Review* 1-15, at 1 (2023).

el as a pivotal development. It is against this background, Maglica engages with national and European developments providing a clear analysis of the incursion or lack of incursion of public interest litigation in the European context.<sup>15</sup>

While public interest litigation typically is instigated with the intention of transformation in mind, thereby following the core trait of transformative law, this seems less so to be the case when looking at conceptual foundations. Conceptually, the core notion justifying public interest litigation is the concept of ‘*meta*-individual litigation’, understood as being concerned with single individuals but also going beyond single individuals insofar as it affects a whole group of individuals or community.<sup>16</sup> Hence, *meta*-individual litigation reflects the dominant US twin-episteme of law in the sense that it operates with a concept of aggregation of individual rights. With its departure from this concept, the US-inspired version of public interest litigation follows in the same footsteps as the law and economics understanding of the corporation as a bundle of individual preferences.<sup>17</sup>

Following the concept of legally constituted public power outlined above, public interest litigation does, furthermore, not seem to be able to transform societal power into public power. The starting point for public interest litigation is a concrete individual case. Combined with the logic concerning the aggregation of individual rights, this means that the degree of abstraction is limited. Second, the focus on ‘groups’ or ‘communities’ rather than ‘society’, understood as a singular society, moreover, gives reminiscences of the interwar ‘law as a tool’ episteme characterised by its attempt to advantage particularist groups in society on the basis of de facto collectivist rights. Hence public interest litigation advances particularistic collective interests not generality and equality. So although aimed at tackling blatant asymmetries and disadvantages in society, from a legal point of view, public interest litigation might be considered a fragmenting rather than an integrating tool. The visible fragmentation of contemporary US society as reflected in socio-economic and spatial disparities and a considerable erosion of the functional and normative integrity of its institutions of public power might partially be explained through the absence of a societal perspective and focus point as inherent to the US twin-episteme of law.<sup>18</sup> Hence, the recourse to public interest litigation rather than regulation with a societal wide reach, the classical civil law approach, might be seen as part of the problem rather than the solution to the ills of both US and EU societies.

## 4.2 Legal Mobilisation of Private-Interest Actors in the Preliminary Ruling Procedure

In her very informative and empirically well-founded contribution, Monika Glavina unfolds a new research agenda concerning legal mobilisation of private-interest actors in the preliminary ruling procedure before the Court of Justice of the EU (CJEU). The background is that the role of private-interests actors in EU legal mobilisation – undertakings, companies, business, industry and other for-profit actors – has been neglected when studying the invoking of the preliminary ruling procedure. She goes on to argue that private actors are crucial catalysts of the invoking of the preliminary ruling procedure. As in the contribution dealt with above, one detects the influence of US-American developments as Glavina takes her starting point from the concept of legal mobilisation first coined in the context of US political science. She makes us aware that scholarly interest in how individuals and collective actors mobilise law to spark societal or political change has long featured in US political science and socio-legal literature.<sup>19</sup> In the US context, the concept of legal mobilisation is used to describe how a desire or want is translated into a legal assertion of one’s rights. More specifically, Glavina argues that

[i]n a narrow sense, legal mobilization involves high-profile litigation efforts for (or sometimes against) social change. In a broader sense, it involves any type of process by which individuals and/or collective actors invoke legal norms to influence policy, culture or behaviour.<sup>20</sup>

This makes legal mobilisation, she argues, distinct from both strategic litigation and lobbying.

Just like the concept of public interest litigation, the concept of legal mobilisation is another concept which, from an overall perspective, is neatly aligned with a transformative law perspective as it is oriented towards instigating social change or preventing social change with the latter also having societal effects. Glavina, however, gives privileged emphasis to economic actors and commercial activities, de facto seeing them as the central driver of legal mobilisation in the context of the preliminary ruling procedure. In this sense, she epistemologically writes in the market-focused perspective inherent to the ‘law as an obstacle’ episteme where, as mentioned, law and legal regulation are regarded obstacles to market equilibriums emerging through spontaneous ordering or, secondarily, and more relevant in this context, as the second-best option only to be invoked in case of market imperfections. Legal mobilisation of private actors in relation to the preliminary ruling procedure, in other words, seems to be activated or instru-

15 *Ibid.*, at 6ff.

16 *Ibid.*, at 3.

17 K. Ayotte and H. Hansmann, ‘A Nexus of Contracts Theory of Legal Entities’, 42 *International Review of Law and Economics* 1-12 (2015).

18 Kjaer (2021), above n. 6, at 2ff.

19 The term ‘collective actors’ is, it might be argued, a somewhat unfathomable concept representing a methodological individualist attempt to compensate for the lack of a concept encapsulating systemic developments.

20 M. Glavina, ‘Private-Interests Actors as Catalysts for Actions under Public Law’, 16(2) *Erasmus Law Review* 1-16, at 3 (2023).

mentalised for the purpose of furthering particular economic interests.

From the perspective of legally constituted public power, the starting point from particular economic interests is, in principle, not an issue per se if the legal procedure in question, in this case, the preliminary ruling procedure, transforms the particular interest into a legal norm which can stand the test of generality, making it universally binding. As pointed out by the strong empirical insights Glavina presents, the ‘economic bias’, especially before 2009, the entering into force of the Lisbon Treaty and the EU Charter of Fundamental Rights, in relation to legal mobilisation vis-à-vis the preliminary ruling procedure, however, indicates a structural imbalance tilting EU law towards an economic perspective.

### 4.3 The Goal of Bankruptcy Proceedings

In her fascinating piece, Jessie M.W. Pool departs from the discourse of sustainability and introduces the term ‘sustainable liquidation’ in relation to bankruptcy proceedings. In company law, balancing of the interests of shareholders and the interests of other stakeholders has been ‘a subject of concern’.<sup>21</sup> Should the interests of shareholders always trump the interests of employees or broader societal interests of, for example, an environmental or social nature, she asks. Hence, empirically, she sets out to investigate how Dutch bankruptcy trustees see their task, i.e. if they are only focused on recovering funds of creditors or they go beyond this on the basis of a multistakeholder perspective. The context of this question is, she explains, a gradual transformation of Dutch company law, away from an exclusive focus on maximising the profits for joint creditors to a more stakeholder-focused perspective. A transformation reflected in several Dutch supreme court rulings, including one stating that societal interests might trump the interests of the individual creditor under certain circumstances.<sup>22</sup> Pool’s empirical findings illustrate that bankruptcy trustees strive to take into account broader societal concerns, but when in conflict with creditor interests, the latter perspective tends to prevail. Hence, she proposes implementing a multistakeholder perspective in insolvency proceedings and, in doing so, specifically argues against a narrow law and economics approach where only the interest of the creditor is taken into account. Instead, she develops a multistakeholder concept consisting of a continuum of internal and external direct and also indirect stakeholders.<sup>23</sup>

As mentioned, Pool departs from the discourse of sustainability and introduces the term ‘sustainable liquidation’ and as such writes herself directly into a transformative law perspective as outlined above. A crucial element of transformative law is exactly not to understand companies (and all other organisations), as single-purpose organisations but rather as multi-dimen-

sional institutions operating in complex environments simultaneously fulfilling multiple purposes.<sup>24</sup> This, as Pool argues, is also the case in their final moments. In this sense, Pool’s suggestion also plays into an understanding of public power as abstracting and universalising rather than reflecting particular interests when dealing with the problem constellations emerging from bankruptcy proceedings.

### 4.4 Human Rights in Third-Party Litigation

With her very thought-provoking and rich contribution concerned with human rights in third-party legislation, Maria Carlota Ucin places herself right at the centre of the dominant twin-episteme of law of the last fifty years made up by law and economics and human rights law.<sup>25</sup> Her particular focus point is access to justice as a human right and the issue of effective access to courts and the curtailing of state resources aimed at ensuring access to courts. Against this background, she observes a marketisation of access to justice regarding certain claims through increased reliance on litigation costs insurance, crowdfunding and so-called contingency-free agreements and damage-based agreements as well as third-party litigation funding. Ucin zooms in on the latter, defined as a contract enabling an investor with no direct interest in the matter to cover the legal fees of one party in a legal dispute receiving a return of that investment to the extent the case is successful. In particular, she focuses on common law developments and their (implicit) influence, in the Continental European context, most notably through Directive (EU) 2020/1828 of the European Parliament on Representative Actions for Redress Measures on Behalf of Consumers. Moreover, in concrete, she develops a continuum of approaches to the regulation of third-party litigation funding, ranging from prohibition, strict regulation, moderate regulation and self-regulation to free-market alternatives. Her analysis leads her to conclude that departing from her observed transformation in the functions exercised by states due to increased privatisation and delegation of functions to private actors, new regulatory measures vis-à-vis new market-based actors are needed. Measures aimed at preventing the corruption of the access to justice and an erosion of the intrinsic rule of law values while also reinforcing the link to the human rights discourse on the access to justice.

While not explicitly stated in those terms, Ucin’s contribution might be considered as occupied with the sustainability of justice, i.e. regulatory concerns in relation to the long-term functional and normative integrity of the legal system. In this sense, the work is compatible with and from a transformative law perspective. While Ucin goes to great lengths to avoid a deeper normative engagement with the question of the desirability of the increased marketisation of access to justice, she also implicitly accepts the dominance of law and economics as

21 J.M.W. Pool, ‘Rethinking the Goal of Bankruptcy Proceedings: Maximizing Value Versus Sustainable Liquidation’, 16(2) *Erasmus Law Review* 1-10, at 1 (2023).

22 *Ibid.*, at 3.

23 *Ibid.*, at 7ff.

24 Kjaer (2022), above n. 3, at 771f.

25 M.C. Ucin, ‘How Can Business Best Approach Human Rights in Third-Party Litigation Funding?’, 16(2) *Erasmus Law Review* 1-12 (2023).

a factual reality. When combined with the human rights law perspective, she, as mentioned, places her scholarship at the centre of the dominant twin-episteme of law of the last fifty years. Viewed from a public power perspective, her major concern indeed seems to be the undermining of not only access to justice but also justice, understood as a manifestation of generality and equality before the law, through the incursion of particular interests. With her detailed, careful and very sensible reflections on how to regulate third-party litigation funding, she strikes a delicate balance between normative aspirations and the facticity of the world we live in.

#### 4.5 Meta's Oversight Board

Pamela San Martín delves into Meta's Oversight Board of which she is a member providing an illuminating view mixing external and internal perspectives.<sup>26</sup> Starting out from international human rights law, she zooms in on the problem that the regulatory human rights framework was designed to protect individuals from state action, not from the actions of private actors. The actions of private actors, especially private economic actors, has, however, created the basis for the emergence of a specific regime for business and human rights over the past decades. Digitalisation has reinforced this as problematic due to the rise of largescale companies, such as Meta, running digital social media platforms with a global reach serving as gateways of information and intermediaries of expression. This brings issues related to the freedom of expression, among other issues, to the centre of attention.

Practically, the issue of content moderation has become central, raising issues in relation to the manifold societal contexts across the globe characterised by cultural, linguistic, political, religious and socio-economic diversity reached through social media. Hence appropriate standards and norms, procedures for decision-making and redress is faced with the challenge to square the circle between standardised non-discriminatory global norms and contextual adaptations. This again leads to the question of the appropriate legal regimes serving as regulators of online platforms, with national law, EU law (e.g. Digital Services Act), public international law or private transnational law among the contenders.

Meta's Oversight Board, as a self-regulatory structure, belongs, it could be argued, to the latter category of private transnational law. Through a legal construction, which seems to be a textbook implementation of David Sciulli's theory of societal constitutionalism,<sup>27</sup> the Oversight Board is established as an institutional, functionally and financially independent body tasked with ensuring freedom of expression by making principled decisions on content uploaded to and shared via Meta's platforms.

San Martín, like Ucin, places herself right in the centre of the dominant twin-episteme of law of the last fifty years made up by law and economics (broadly understood) and human rights law. The circle squaring exercise between developing and upholding global norms in relation to freedom of expression and related areas and their adaptation to diverse societal contexts can furthermore be considered a core trademark of 'global law'.<sup>28</sup> Factually, though not officially, the Oversight Board becomes a norm entrepreneur,<sup>29</sup> creating norms not previously present, thereby transforming the global freedom of expression landscape and also the sustainability of that landscape. While that is in line with a transformative law perspective, the most interesting part is how a formally private entity is legally constructed as an institutional repository of public power. While departing from specific cases, the Oversight Board strives to make principle-based decisions with the objective of establishing general norms with a global reach. Hence, its activities can, at least potentially, be considered as an exercise in distilling public power from societal power through the conversion of particularistic interests into general norms while also linking up to the core rule of law principles concerning equality, concrete problem-solving and non-retroactiveness.

In addition, the establishment of the Oversight Board is an important, surely insufficient, but nonetheless important element in the transformation of Meta from an organisation, in this case, a corporation, and into an institution. An institution, in contrast to a corporation, does not have a one-dimensional obligation to produce shareholder value but is instead legally constructed as a multifaceted institution with several – potentially – conflicting social obligations within the framework of a multistakeholder perspective.<sup>30</sup> A development underlining that the formal private/public distinction, derived from an entity being private and public property, is not a useful distinction for delineating public and societal power. Rather an island of legally constituted public power appears wherever it is legally constructed, be it in national, transnational or formally private or public contexts.<sup>31</sup>

## 5 Perspectives: Beyond Private and Public Interests

In his *Theory of Communicative Action*, Jürgen Habermas engaged in a meticulous deconstruction of the Weberian concept of rationality and the concept of interest derived from it. From a Weberian perspective, rationality is strategic, and it is aimed at maximising utility for oneself. Interests, as also apparent in Weber's concept of

26 P.S. Martín, 'Meta's Oversight Board', 16(2) *Erasmus Law Review* 1-16 (2023).

27 D. Sciulli, *Theory of Societal Constitutionalism. Foundations of a Non-Marxist Critical Theory* (1991); D. Sciulli, *Corporate Power in Civil Society. An Application of Societal Constitutionalism* (2001).

28 Kjaer (2019), above n. 13, at 302-318.

29 C.R. Sunstein, 'Social Norms and Social Roles', 96(4) *Columbia Law Review* 903-68 (1996).

30 Kjaer (2022), above n. 3, at 771f.

31 *Ibid.*

power mentioned above, are therefore of a strategic and instrumental nature. While not refuting the existence of the strategic and instrumental dimension of social exchanges, Habermas adds two additional dimensions in the form of social rationality and dramaturgical rationality, the latter being oriented towards compatibility with the social context and the norms guiding the context where a social exchange takes place. The former implies performative self-presentation in the sense that bearers of social exchanges are reflexive about them being observed by third parties and how they come across in those observations.<sup>32</sup> Hence, from this perspective, the concept of ‘interest’ is a reductionist concept only catering to one of the three dimensions of rationality.

It emerges from the above that it might be advantageous to abandon the vocabulary of private and public interests guiding the interventions in this special issue. Such a move might create a space for conceptual innovations allowing for more concise empirical work, creative policy solutions and legal precision. Maybe the private/public interest distinction hampers more than it helps. The concept of public power outlined in this article illustrates this very well. Through its reliance on principles of abstraction, generality, equality, particularness and non-retroactiveness, it defies the logic of being the expression of a particular interest. Hence, while there is such a thing as public power, there is no such thing as public interest understood as operational *modus* purely based on strategic, i.e. instrumental rationality. The same goes for societal power. Because of being linked to specific individuals or groups of individuals, particularistic interests, patrimonialism, informal relations and reciprocity-bound essential circular concepts of time, societal power is also embedded power. Norm compatibility and performative self-presentation, for example tend to be a central aspect of group inclusion and patrimonial relations. When linked with the empirical observation that the private/public distinction tends to be systematically unclear due to blurred formal boundaries, the perspective emerges that a new vocabulary of legally constituted public power and societal power might provide a more concise conceptuality for analysing challenges to the interfaces between the private and the public.

32 J. Habermas, *Theorie des kommunikativen Handelns, Band 1. Handlungsrationality und gesellschaftliche Rationalisierung* (1981), at 15ff, 129ff and 239ff.