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Kjær, Poul F.

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CORE ANALYSIS

What is transformative law?

Poul F. Kjaer

Department of Business Humanities and Law, Copenhagen Business School, Frederiksberg, Denmark
Corresponding author. E-mail: pfk.bhl@cbs.dk

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Abstract

In the western context, law has two functions. It upholds normative expectations and it transforms social phenomena. The latter is expressed through the form-giving function of law, as law designates particular social phenomena, such as, for example, economic, political or religious. Inside such overarching categories, further subcategories can moreover be observed. In relation to economic processes, the legal institutions of competition, contract, corporation and property are, for example, classical examples of the form-giving function of law. The dual function of law is briefly illustrated through a genealogy of imaginaries of law distinguishing between four historically dominant types of law: 'Law as purpose'; 'law as a tool'; 'law as an obstacle'; and 'law as reflexivity-initiation'. On this background, ten core dimensions of what might become a new episteme of transformative law are fleshed out with the aim of answering the question to what extent it can act as an alternative to the previous four types of law.

Keywords: function of law; form-giving; infrastructural power; law of political economy; reflexive law; rights; time and law; transformative law

1. Introduction: beyond ex ante and ex post

Upholding normative expectations is a key function of law.[1] This insight indicates that law has a conservative DNA to the extent that it is oriented towards the use of present reconstructions of the past to reaffirm existing norms with the purpose of transposing them into the future. However, law transforms, too. A key characteristic of world society in its manifold local, national and transnational contexts is the sustained demand for legal norms in the attempt to stabilise but also expand and transform all sorts of social processes. As apparent from the other contributors to this special issue, the legal institutions of competition,[2] contract,[3] corporation[4] and property[5] are – among many others – key examples of this. On this backdrop, elements of a concept of transformative law is outlined as relying on an epistemological understanding of law as form-giving. It is through form-giving that law constitutes a social phenomenon as a legal institution and it is form-giving which gives law a strategically central position in society. How law and legal scholarship have dealt with the form-giving function over time is briefly illustrated through a genealogy of imaginaries of law distinguishing between four historically dominant types of law

[1]N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp Verlag 1993).
[2]See the contributions of Or Brook and Ioannis Lianos to this special issue.
[3]See the contributions of Daniela Caruso and Klaas Eller to this special issue.
[4]See the contributions of Marija Bartl and Lilian Moncrieff to this special issue.
[5]See the contribution of Jean-Philippe Robé to this special issue.

in the western context: 'law as purpose'; 'law as a tool'; 'law as an obstacle'; and 'law as reflexivity-initiation'.[6] On this background, the core dimensions of transformative law are fleshed out with the aim of answering the question to what extent it can act as an alternative to the previous four types of law. It is emphasised that the potentiality of transformative law can be boiled down to a question of time as it is in the tension between ex ante and ex post law the crux of transformative law lies.[7]

Hence, a twofold strategy is unveiled. On the one hand, the article provides a conceptual framework situating the remaining contributions of this special issue. On the other hand, it also goes further by engaging in a dual (de-)constructing exercise of transformative law, including of its origin, novelty, possible effects and potentialities.

2. The strategic position of law in society

Modern law in the Western sense emerged with the legally defined and maintained differentiation between religion and politics in the wake of the Investiture Conflict between Emperor and Pope from 1076 to 1122.[8] The dispute emerged due to the administrative law question concerning which of the two had the competence to appoint abbeys and bishops. However, more generally, it was about who was the sovereign, ie who stood above who. The emperor or the pope? The conflict ended with a compromise. The emperor was recognised as the sovereign of the worldly world and the pope as the sovereign of the spiritual world. The pope could thus appoint abbeys and bishops, but they had to swear allegiance to the emperor. The church thereby retained the monopoly on interpreting the religious text, but when the representatives of the church acted in worldly affairs in relation to everything from tax collection to military mobilisation, it was the emperor that came into play. The consequence was the creation of two different universes – the religious and the political – that were reproduced in parallel while being closely linked. Using legal instruments, the two universes were differentiated and interconnected at the same time. Tax revenues, blessings and other components of meaning could be transferred by legal means from one legally defined parallel universe to another.[9] The function of the law as differentiator and interconnector necessitated the development of a refined conceptual apparatus. Hence, it was hardly a coincidence that the Investiture Conflict coincided with the foundation of the first university in 1088 in Bologna. A university that had the reformulation of Roman and canon law as its primary focus point thereby initiating the creation of the modern legal profession.

From the 16th century onwards, the logic behind the differentiation and interconnection of religion and politics through legal means was, in the European context, extrapolated to the relationship between economy and politics. Prior to the introduction of the distinction between the 'economic' and 'political' dimensions of society the institution of the household, from the manor to the court, was the central organising form of social processes providing an integrated institutional repository for the exercise of power and socio-economic reproduction.[10] The 16th century

[6]For the concept of imaginaries of law see M Bartl, 'Socio-Economic Imaginaries and European Private Law' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 228–53. See also the contributions of M Bartl and L Moncrieff to this special issue.

[7]KH Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation' 3 (3) (2012) Transnational Legal Theory 243–67.

[8]HJ Berman, *Law and Revolution: The formation of the Western Legal Tradition* (Harvard University Press 1983); H Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury 2014). The western focus means that what follows only have validity in relation to legal processes, irrespectively of where they are unfolded, which can be understood as part of the western understanding and institutional form of law. The implications of this for alternative legal forms of law is the subject of another publication. See PF Kjaer, 'Global Law as Intercontextuality and as Interlegality' in J Klabbers and G Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press 2019) 302–18.

[9]H Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury 2014) 90ff.

[10]N Elias, *Die höfische Gesellschaft: Untersuchungen zur Soziologie des Königtums und der höfischen Aristokratie* (Suhrkamp Verlag [1969] 2007).

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emergence of the concept of 'political economy' however indicated the moment where economy and politics started to become differentiated. 'Political economy', in other words, only became a relevant concept in the moment a distinction could be observed between the political and the economic dimensions of society as this created a functional and normative need to problematise and to stabilise the relationship between these two dimensions of society.[11] Also in this context, law was the central conceptual and practical framework. Especially the expansion of property rights, and with it the conceptual distinction between private and public, was the crucial institutional formation allowing for this development.[12] The crux of the emergence of political economy was a dual and simultaneous move towards differentiation and reconnection as expressed in the intertwined nexus of property rights and taxation with both of them unfolding within a specific legal form. It is first with the separation of the economy from the political sphere through property rights that taxation, ie the transfer of resources from the economy to the political system became possible.[13] In the same manner as the conceptuality of modern statehood emerged out of Christian theological conceptuality,[14] the political economy problematique and the law of political economy was a secondary appearance of a logic that originally emerged in the nexus between religion and politics.[15]

Since the legally instigated differentiation and interconnection of politics and religion and the subsequent differentiation of economy and politics, the function of law as simultaneous differentiator and interconnector has extrapolated multiple times. This can, for example, be observed in the striving towards the expulsion of religious doctrines from the classroom, ie the separation of religion and education and the manifold legal questions and conflicts emerging from this.[16] The formation of modern science as an activity ideally based on the search for truth free from economic, political and religious interference as for example expressed through legal codification in university constitutions is another classical example.[17] The conundrums of modern sports law faced with questions of structuring the interface between sports, on the one hand, and medicine (eg doping) and economic influence due to increased commercialisation, on the other hand, is yet another example.[18] In all these cases, and many more could be thought of, law is concerned with erecting boundaries between different dimensions of society while also allowing for interfaces within strict legal forms enabling transplantations of components of meaning, such as religious texts, science funding or pharmaceutical products, from one dimension to another in a legally distilled and controlled form.[19]

The function of law as simultaneous differentiator and interconnector gives it a particular position in society. Not a position of outright supremacy but instead one as an infrastructural grid. Michael Mann conceived of state power as infrastructural power distinguishing it from despotic power.[20] Despotic power Mann understands as actions undertaken by state elites 'without routine, institutionalised negotiation with civil society groups'[21] and infrastructural power as 'the capacity

[11]PF Kjaer, 'The Law of Political Economy: An Introduction' in PF. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 1–30.

[12]See the contribution of Jean-Philippe Robé to this special issue.

[13]For more on this see the contribution of Jean-Philippe Robé to this special issue.

[14]EH Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press [1957] 1997).

[15]A de Montchrestien, *Traicté de l'oeconomie politique*, edited by F Billacois (Librairie Droz [1615] 1999).

[16]JE Harpster, 'Religion, Education and the Law' 36 (1) (1952) Marquire Law Review 24–66.

[17]J Habermas, 'Für ein neues Konzept der Hochschulverfassung' in J Habermas *Protestbewegung und Hochschulreform* (Suhrkamp Verlag 1969) 157–85; E Zilsel, 'The sociological Roots of Science' 47 (4) (1942) The American Journal of Sociology 544–62.

[18]PF Kjaer, 'Law and Order Within and Beyond National Configurations' in PF Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing 2011) 395–430.

[19]Ibid., 398f.

[20]M Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' 25 (2) (1984) European Journal of Sociology/Archives Européennes de Sociologie/Europäisches Archiv für Soziologie 185–213.

[21]Ibid., 188.

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of the state to actually penetrate civil society, and to implement logistically political decisions throughout the realm'.[22] In a slightly different take he also describes infrastructural power as 'the power of the state to penetrate and centrally co-ordinate the activities of civil society through its own infrastructure'.[23] This perspective might be considered 'methodological state-centric', discarding non-state-centric forms of local and transnational power, – just as the, essentially Hegelian, distinction between state and civil society is rather simplistic and reductionist given the manifold differentiations between economy, education, politics, religion, science (and so forth) characterising modern society. More central to this article is however that, according to Mann, 'there is virtually no technique [of infrastructural power] which belongs necessarily to the state, or conversely to civil society'.[24] Hence, infrastructural power is societal power, with the concept of society denoting the category of all social communications and phenomena in world society.[25] The concept of society thereby transcends established distinctions such as private/public, state/civil society and the tripartite local/national/transnational distinction. An adequate understanding of infrastructural power is therefore conditioned by a corresponding concept of society and indeed its conceptual incorporation and unfolding within the framework of a general theory of society.[26] Even more central to this article, is, however, that Mann mixes up the categories of power and law. It is law and not power, understood as political power, which provides society with an institutional grid as also expressed in the law's role as simultaneous differentiator and interconnector, as outlined above. While power is intrinsic to all social relations, political power is a specific kind of power distinguishable from personal power due to its abstractness and generalisability as derived from its legal form. In this specific sense, it is law that constitutes political power as a specific social phenomenon.[27] As will become apparent below, form-giving and synchronisation, ie the harmonisation of time structures, are the central ways the simultaneous and dual differentiator and interconnector function manifests itself. A function which might be considered the second key function of law besides the upholding of normative expectations. A function which however have been unfolded and reflected upon differently at different times, as also expressed in the understanding of 'law as purpose'; 'law as a tool'; 'law as an obstacle' and 'law as reflexivity-initiation'.[28]

3. Law as purpose

As is well known, a decisive transformation in the self-understanding of law was initiated in the German speaking part of the world in the first half of the 19th century. Advanced by Friedrich Carl von Savigny and others within the German Historical School of Jurisprudence, this transformation of law became itself an object of study through Max Weber's subsequent sociological

[22]Ibid., 189.

[23]Ibid., 190.

[24]Ibid., 194.

[25]N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag 1997) 145–70.

[26]PF Kjaer, 'How to Study Worlds: Or Why One Should (Not) Care about Methodology' in M Bartl and JC Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022) 208–22.

[27]See also PF Kjaer, 'European Crises of Legally-Constituted Public Power: From the "Law of Corporatism" to the "Law of Governance"' 23 (5) (2017) European Law Journal 417–30, 418–21. In addition, 'anti-institutional' political endeavours might proclaim to rely on alternative forms of power but only in the form of a negative definition of such power as 'non-institutionalised', ie non-legally defined. See eg M Punch, 'The Sociology of the Anti-Institution' 25 (3) (1974) The British Journal of Sociology 312–25.

[28]The distinction between these four types of law have some elements in common with and also draws upon Duncan Kennedy's distinction between 'classical legal thought', 'social legal thought' and recent US–American legal thought but the periodisation differs somewhat just as this underlying question concerning the function of law and hence the knowledge interest is a fundamentally different one. See D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19–73. For the alternative and with a stronger European focus: Kjaer (n 11) 1–30.

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reconstruction of it at the turn of the 19th century.[29] The historical school developed a notion of jurisprudence enabling an understanding of it as an objective science that observed law as a system that was coherent and rational. Based on a deductive method, a scientific universe could be created in which all legal norms fitted in and supported each other in a coherent manner. The law and its unfolding thus became an objective in itself in two different ways. Internally, the ideal was that the law should be positivist, ie build on the laws own basis and not on external moral, political, religious or other factors. The distinction between morality, acting as a meta-category, and law thereby became central for the constitution of the autonomy of law. The law was – by itself – given the right to have right without, in principle or conceptually, having to take external factors into account. The law thus became an end in itself. Externally, the law was conceived of as providing an optimal framework for the organisation of society, understood as an optimal degree of simultaneous differentiation and interconnection of different social processes. An understanding of law which was intimately linked to the concept of society to the extent that law was considered to emerge from 'the people' (*das Volk*), understood as an equivalent to 'society', rather than from the state. This was also reflected in the understanding of private law, especially contract law, as the central form of law. Consequently, a staunchly methodological individualist perspective was advanced emphasising a strict formalistic approach to the equality of legal subjects. The perfectly legally regulated society thus also became an objective in itself. An objective which Weber and others captured and linked to progressive liberal ideas of a democratic state and a neutral public bureaucracy.[30]

4. Law as a tool

After a long run that stretched back to the latter half of the 19th century, the tremors of World War I allowed for the emergence of a new conception of law as a tool. The law was increasingly considered to be an instrument that could be used as a lever for ideological projects and for the realisation of political objectives within a corporatist framework. Common to otherwise very different ideological currents such as anarchism, fascism, communism, National Socialism and socialism, which to different degrees experienced their breakthroughs in the interwar period, was that they reinterpreted the status of law in society. Contrary to the idea of the law as a purpose, the new ideological currents regarded law as an obstacle for the fulfilment of political utopias. Alternatively, and less radically, they regarded law as a tool that could be used to realise political objectives without the law being considered as an end in itself or as having an independent influence on the development of society. Law in other words became increasingly conceived of as a tool for social engineering and the broader social sciences, such as economics, management studies and sociology became the core source of inspiration and the ideal model legal scholarship sought to replicate.[31] In practice, this meant an instrumentalisation and downgrading of the status of law, albeit with a very large degree of difference in the broad span from anarchism to socialism. To the extent rights were invoked they moreover tended to be collective rights. While the German Historical School of Jurisprudence had emphasised individual freedom, social justice and rights, for a particular group, ie a specific 'class', 'ethnic group', 'profession' or 'race' moreover became a common focus point for the otherwise very different ideological streams under the 'law as a tool' perspective. The form-giving function of law was in this context deployed and instrumentalised with the function of differentiating specific groups and augmenting the advantages of one group vis-à-vis other groups.[32]

[29]M Weber, *Rechtssoziologie. Aus dem Manuskript herausgegeben und eingeleitet von Johannes Winckelmann* (Hermann Luchterhand Verlag 1960).

[30]M Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (Mohr Siebeck [1922] 1980) 825ff.

[31]For an overview see Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' 19–73, 37ff.

[32]See the contributions in C Joerges and NS Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003).

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The struggle between the understanding of law as an objective or the law as a tool unfolded over decades and continues in many ways today.[33] In many western national contexts, a de facto compromise was however reached in the post-WWII neo-corporatist period with elements from both camps present in daily practice and the organisational setup of core institutions of political economy.[34] From the outset, labour law was the core area of experimentation for law as a tool approaches.[35] The development of the welfare state in the years before and after 1968 moreover implied strong tailwinds for the law as a tool approach, as other welfare-related policy areas such as education, social security and elderly care became increasingly central.

The way the 'law as a tool' approaches were deployed and the effects produced however underwent a drastic transformation after 1945. With central and eastern Europe under Soviet control post-1945, the Western European settings became central for the development of across-the-board universal legal frameworks – frameworks that were transnational in nature but were implemented in different national settings.[36] This especially took the form of the nation-wide labour market and welfare regimes based on a principle of universal inclusion and characterised by extensive synchronisation of a manifold of social processes throughout national contexts within formalised legal regimes.[37] Hence, while the 'law as a tool' approach remained dominant, in contrast to the interwar period, it was coupled with ideas of democratic universalism, formalisation of institutions and decision-making procedures, as well as societal-wide synchronisation.[38]

5. Law as an obstacle

Combined with exogenous factors such as the oil-price shock, the explosive growth of the (welfare) state led to a governing and financial crisis in the 1970s in many western settings. The state's complexity in everything from budget size, number of employees and policy areas increased sharply throughout the western world, while the state's overall legal framework, eg basic constitutional structure, in most cases remained a leftover from the 19th century with evolutionary evolved labour and welfare regimes added 'on top'. In this context, the law increasingly was perceived of as a straitjacket associated with an old-fashioned *Obrigkeitsstaat*, ie authoritarian state, and thereby as an obstacle to the realisation of the social objectives associated with the evolving welfare state,[39] while from another perspective, it was seen as a danger to personal freedom and societal dynamism.[40]

One of the many consequences, in particular in the US-American setting, was the development of the law and economics episteme, ie the analysis of the law as it is and should be, in a positivist and normative sense, using microeconomic methods.[41] Law and economics was furthermore

[33]For an illustration of the ongoing struggle in relation to competition law, see the contribution of Or Brook to this special issue.

[34]Kjaer (n 11) 1–30.

[35]For a reconstruction see especially R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014); See also O Kahn-Freund, *Labour and the Law* (Hamlyn Trust 1972); H Sinzheimer, *Arbeitsrecht und Rechtsoziologie. Gesammelte Aufsätze und Reden*, edited by Otto Kahn-Freund and Thilo Ramm (Europäische Verlagsanstalt 1976).

[36]PF Kjaer, 'The Transnational Constitution of National Social Market Economies: A Question of Constitutional Imbalances?' 57 (1) (2019) Journal of Common Market Studies 143–58.

[37]PF Kjaer, 'Towards a Sociology of Intermediary Institutions: The Role of Law in Corporatism, Neo-Corporatism and Governance' in M Rask Madsen and C Thornhill (eds), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (Cambridge University Press 2014) 117–41.

[38]Ibid.

[39]Eg J Habermas, *Legitimitätsprobleme im Spätkapitalismus* (Suhrkamp Verlag 1971).

[40]Eg M Friedman and R Friedman, *Free to Choose: A Personal Statement* (Hartcourt 1980).

[41]K Grechenig and M Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' 31 (2008) Hastings International and Comparative Law Review 295–260.

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supplemented with a large number of non-legal management approaches up through the 1970s and 80s – approaches which subsequently were collected under the management episteme New Public Management (NPM) and later followed up by the New Public Governance (NPG) episteme.[42] The shared objective of these three epistemes was to increase dynamism and efficiency in the public sector and in private–public grey zones, ie the networks and partnerships surrounding the core of the public sector, through the introduction of competition, privatisation, outsourcing, financial incentives and removal of 'red tape'. The ultimate societal unit which this type of law departed from was therefore 'the market' in the sense that, in principle, all social processes were conceived of in market terms, either operating as markets or legally and managerially constructed, in a manner aimed at allowing them to mimic market-based processes. Economic actors, modelled on the image of the individual, thus became central bearers of rights as for example expressed through EU internal market law and the four freedoms concerning free movement of goods, capital, services, and people.[43] The legal ideal and core normative idea was thus one of law enabling as free and optimised economic social exchanges as possible with market exchanges understood as the ideal type of social exchange which other forms of social exchanges should aspire to mimic. The idea of governance enshrined in this episteme was, thus, one where public authorities mainly acted as facilitators of market optimisation. Contracts or public-sector pseudo-contracts thus became central legal instruments, just as the boundary between law and politics became the central ideological point of dispute.

From the perspective of the 'law as an obstacle' episteme, the law was again perceived of as blocking the release of adaptation and dynamism throughout society. At the same time, and quite paradoxically, functional equivalents to formal law were in strong demand. This was, for example, the case through the imitation of legal processes through performance management within organisations relying on 'contracts' without these being contracts in the narrow legal sense. These new forms of contract management were predominantly developed by economists and political scientists rather than lawyers, and have been used to supplant traditional, mainly administrative law, ways of organising public and private–public relations. This development has, in many settings, contributed to a strategic marginalisation of the law and the legal profession. In the traditional 'law as a purpose' setup the law was conceived of as an ex ante phenomenon. It was through law the world was defined and interpreted. In the 'law as an obstacle' episteme this is different. Administrative, managerial and political decisions are made and subsequently submitted to the legal unit of the organisation in question for verification of their legality. A picture which also has merged within contracting and contract theory and, thus, within private law. Traditionally, contracts were considered the central object of negotiations in business transactions. Today, contracting is mainly considered an ex post exercise conducted after agreement has been reached, merely formalising the details.[44]

The 'law as an obstacle' episteme, thus, had a lot in common with the interwar version of the 'law as a tool' approach, while the normative objective was different. In the construction of the welfare state, 'law as a tool' served the purpose of creating social and material rights, while in the 'law as an obstacle' episteme it became an instrument used to dismantle 'publicness' and its replacement with 'privateness' on the basis of an ideal of the market as the optimal form for the organisation of social exchanges. An objective which however rested on the paradox that the desired de-politicising exercise itself was a profoundly political project. De facto 'law as an obstacle' has often metamorphosed into an instrumentalisation of law, ie the use of legal

[42]In this context, Critical Legal Studies (CLS) emerged as an intellectual countermovement to the countermovement. Albeit with, at least in the shorter term, far less factual impact on society than the law and economics and the NPM and NPG epistemes. For CLS see RM Unger, *The Critical Legal Studies Movement* (Verso 2015).

[43]C Joerges, The Law in the Process of Constitutionalizing Europe, Working Paper EUI/Law 2002/04.

[44]Eg DJ Schepker et al, 'The Many Futures of Contracts: Moving beyond Structure and Safeguarding and Adaptation' 40 1 (2014) Journal of Management 193–225.

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instruments to safeguard particular and vested interests through investor protection, dismissal of broader societal objectives of competition law, collective bargaining rights and so forth.

6. Law as reflexivity-initiation

The thinking behind the non-legal approach to 'law as an obstacle' resulted in a number of contradictions and paradoxes. A crucial consequence of the NPM and NPG epistemes, for example, was that public institutions were often transformed into organisations with independent operational economic and strategic responsibility.[45] Institutions have many – typically opposing – objectives and considerations that they need to balance. In most national settings, the postal service, for example, has traditionally been a business, an infrastructure and engaged in industrial and employment policy as well as regional and rural policy at the same time. However, from the narrow organisational perspective that came with NPM and especially the NPG paradigm, the postal service was in many settings increasingly reduced to its 'operational task' and 'core business'. The same optimisation and efficiency approach is behind the many structural reforms from the 1990s onwards, such as municipal mergers, closure or merger of courts, police districts, primary schools, local hospitals and so on, which swept through many – particular north-western European – jurisdictions. The intended and unintended externalities that public institutions such as colleges, schools, hospitals and so on produce for society, including the local contexts in which they are – or were – located, were however poorly captured by the narrow approach to public management and organisation which the 'law as an obstacle' stood for. This again might be a central cause for the increase in the structural imbalance between cities and rural areas, centres of knowledge production and former industrial heartlands which dominates many contemporary settings in the western world.

In legal discourse, there has been a weighty response to the 'law as an obstacle' approach since the early 1980s. The most important contribution is the idea of 'reflexive law', ie an idea of law as a mechanism of reflection. Rather than singular and hierarchical governance, as contained in the idea of law as an objective, complex societies, according to the reflexive law approach, are forced to develop a more indirect approach to governance and judicial intervention. Instead of substantial governance, the law should limit itself to provide a framework for self-regulation within the private sector, but also in relation to areas such as the mass media, research, health, education and so on. In that sense, reflexive law can also be understood as the regulation of self-regulation.[46] According to reflexive law, the various societal logics that drive these spheres should be allowed to unfold on their own terms, while the law installs procedures that will increase the reflexivity capacity and ultimately the adaptation capacity in relation to the externalities that different social activities produces.[47] The examples of such initiatives are numerous and range from requirements for Environmental Impact Assessment (EIA) studies, requirements for ongoing (self-) evaluations of public organisations to frameworks for reflection on Corporate Social Responsibility. Reflexive law can thus be understood as a response to the lack of focus on the broader societal effects of social, including public activities, inherent to the law and economics, New Public Management and New Public Governance approaches.

Reflexive law is decisively societally oriented, in the sense that the unit of departure is society and not the state - a departure which however is not based on the classical state/society distinction. Rather the political system, ie the state, is considered one among many functionally delineated systems of society on par with the economic, educational, religious, scientific etc. systems. Law is, in this context, a functional system among others and the distinction law/environment, thereby, becomes the core boundary, with 'environment' denoting the other non-legal systems in society.

[45]N Brunsson and JP Olsen, *The Reforming Organization: Making Sense of Administrative Change* (Routledge 1993) 15ff.

[46]G Teubner, 'Substantive and Reflexive Elements in Modern Law' 17 (2) (1983) Law & Society Review 239–86.

[47]R Wiethölter, 'Proceduralization of the Category of Law' in C Joerges and DM Trubek (eds), *Critical Legal Thought. An American-German Debate* (Nomos Verlag 1989) 501–10.

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The forms of rights referred to are thus 'systemic rights' in a twofold manner: First of all, human rights obligations are sought to be extended to all systemic structures, including economic actors such as multinational companies, and not just states,[48] and, secondly, through the inclusion of 'non-humans' such as animals and electronic agents.[49] The notion of equality built into reflexive law is, thus, one of 'systemic equality' with the epistemologies, rationalities and status of different systems and their designated agents considered equal. The legal, ie normative ideal, is thus one of law as the guarantor of functional differentiation through the simultaneous differentiation and interconnection of functional systems. In this context, the idea of governance advanced is one of systemic self-regulation on the basis of reflexive incorporation of the functional needs of other systems, just as the central legal instrument becomes one of reflexivity enhancement through proceduralisation, transparency and justification clauses.

7. The promise and potential of transformative law

One of the areas where self-regulation within a reflective framework went the furthest was the financial sector. In hindsight, this did not go so well when taking the 2007 financial crisis into account.[50] The focus on inequality and geographical imbalances, currently dominating public discourse, moreover indicates that the mechanisms of reflexive law, ie the law's ability to create a framework capable of taking account of the broader societal effects of both public and private activities, are insufficient or, at least, that the manifold expectations placed on the law are not met. The law – and society – thus faces a challenge. A return to a highly centralised *Obrigkeitsstaat* operating within a static legal framework is not practically possible in relation to many of society's complex governance challenges and is probably also not considered normatively desirable.[51] The idea that 'the state' has or used to have the capability to exercise a comprehensive and substantial form of control in all areas of society is, moreover, historically questionable. In addition, the massive expansion of the public sector since the 1960s, which in most settings has continued ever since, including in the structural liberal era from the 1980s onwards, means that the 'state' today is an indefinable entity without an actual centre. By mobilising all its resources and using considerable sums of its economic, organisational and political capital, a government might be able to establish itself as a singular centre for a short time. This might be the case in times of war or when managing a pandemic. But this tends only to be possible in the face of a single problem constellation and only for a relatively short period of time, just as the long-term consequences tend to be financial overreach, ie indebtedness, and erosion of decisional capacity.[52] An epistemological focus on a single problem that also makes many other single problems disappear out of sight as long as it goes on. Despite the 19th century ideal of the rational essentially Hegelian state, as expressed by the idea of law as an objective, the state has never possessed an 'epistemological universal view' that gave it the opportunity to observe and construct society as a whole in one particular moment.[53] In other words, the state has never been able to capture, interpret and create society in a total sense

[48]G Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' in M Escamilla and M Saavedra (eds), *Law and Justice in a Global Society* (International Association for Philosophy of Law and Social Philosophy 2005) 547–62.

[49]G Teubner, 'Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law' 33 (4) (2006) Journal of Law and Society 497–521.

[50]See the contributions in: PF Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing 2011).

[51]For an exception in terms of normative desirability see W Streeck, *Zwischen Globalismus und Demokratie: Politische Ökonomie im ausgehenden Neoliberalismus* (Suhrkmap Verlag 2021).

[52]See FL Neumann, *Behemoth. The Structure and Practice of National Socialism 1933–1944* (Ivan R. Dee [1944] 2009) 3ff.

[53]For the Hegelian argument that the states does possess an epistemologically comprehensive view of society see; M Loughlin, 'What Is Constitutionalisation?' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 47–70.

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on the basis of its own perspective. Instead, legally constructed infrastructural power remains non-substantive, providing a framing and moulding of social processes but without the capacity to engage in the micro-management of those processes. The state cannot interpret a religious script, decide on the truthfulness of a scientific argument, establish criteria for what counts as good art or asses the benefits of a specific business transaction.

With the impossibility of going back in time, one might instead seek to look ahead exploring the possibilities for a new approach potentially representing 'a new "evolutionary" stage of law'.[54] One possibility is what might be described as 'transformative law' understood both as a theoretical reflection and as a concrete practice and that both in empirical and normative terms.[55] Hence, transformative law might in a first instance be approached as a sociological, ie factual, phenomenon through a sober assessment of the extent of its actual existence or its potential emergence. In a second instance, one might choose to add a normative dimension assessing its validity. Here, the ambition is more preliminary and less sweeping merely seeking to pinpoint basic touchstones of what transformative law *might* entail in terms of core conceptual characteristics without this necessarily implying a normative endorsement. As such, the following is an exercise meant to invigorate our institutional imagination.[56] This is combined with an assessment of what potentially makes transformative law different from earlier types of law, especially the law as reflexivity-initiation episteme, which it builds upon and with which has certain overlaps, while also going beyond it in numerous ways.

Transformation is a compounded word. 'Formation' refers to a form and the 'trans' part to the act where the form goes beyond its existing form, ie transformation means to 'change form'. The objective of transformative law is thus to change forms. Something has a form and the intention is it must have a different form. Here, three sub-elements can be differentiated in a substantial, social and temporal sense:

In a substantial sense, the focus on form means, firstly, an increased reflection on the law's core task as a simultaneous differentiation and interconnection mechanism. In addition to maintaining norms over time, it is in the simultaneous differentiation and interconnection of different social processes that the social function of law can be found. From this perspective, it is thus central that legislative initiatives and other law generating insights systematically and strategically seek to incorporate this function in the way in which legal principles, norms and other legal instruments are constructed. Secondly, the focus on form implies that law has what might be called a 'soft constituent effect' vis-à-vis social processes, including processes with political economy relevance, as reflected in the forms of competition, contract, corporation and property among others.[57] Mass media, health, science and economic activities are social processes in their own right that reproduce themselves on the basis of their own logics, but it is through concurrence with a legal form that they become institutionalised. Such institutionalisation can be understood as an 'epistemological shaping effect', in the sense that a social exchange of goods only becomes an economic transaction the moment it is categorised as a contract-based exchange, just as a posting on social media is first categorised as a mass media phenomenon within a legally defined understanding of what a mass media is. The law, in other words, categorises social phenomena and acts in that sense as constitutive by giving shape to social processes. Or, in other words: the law gives loosely coupled social elements a tighter form.[58] However, this process goes both ways. The law is constantly forced to respond to changes in the substantial processes it is oriented towards, and typically lags behind in its shaping operations. This is the case, for example, when mass media legislation

[54]G Teubner, 'Substantive and Reflexive Elements in Modern Law' 17 (2) (1983) Law & Society Review 239–86, 242.

[55]For a focus on transformative law in relation to global problems see; PF Kjaer, 'The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law' 2 (1) 2021 Global Perspectives 1–17.

[56]RM Unger, 'Legal Analysis as Institutional Imagination' 59 (1) (1996) Modern Law Review 1–23.

[57]For a very illustrative account in relation to property, see the contribution of Jean-Philippe Robé to this special issue.

[58]F Heider, *Ding und Medium. Herausgegeben und mit einem Vorwort versehen von Dirk Baecker* (Kulturverlag Kadmos [1926] 2005).

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appears outdated in relation to the new reality created by the emergence and rapid evolution of social media, or when new forms of treatment make existing health guidelines outdated. The consequence is a constant 'crisis of regulation', since many of the 'crises', 'problems' and 'lack of consensus' that modern societies are characterised by can be attributed to such time gaps, where social processes have changed while the tighter form, which the law provides, has not followed along and, therefore, no longer captures these processes in full. A time gap which the shift from an ex ante to an ex post perspective on the legal systems position in society, as driven forward by the NPM and NPG epistemes, reinforces by consistently seeing the relevance of the law as a secondary post-rationalisation, rather than as the spearhead defining a given problem in the first place. However, a return to a purely ex ante approach to justice does not seem realistic and, therefore, opens up for the question of how a higher degree of societal stabilisation can then be achieved. A middle ground could be a 'co-constitutive approach' where the simultaneity between legal and non-judicial processes is strengthened, and the formative function of law becomes more dynamic. However, a complete overlap will not be achievable and will not be meaningful since the central task of law, in addition to the differentiation and reconnection function, is precisely to stabilise expectations over time through the maintenance of norms. A total overlap in time will therefore also mean a cessation of the distinction between the legal and the non-legal as they would become identical.[59] The temporal friction is necessary to maintain the functional and normative integrity of the law and the challenge is, therefore, to make the temporal friction between the legal and the non-legal into a constructive and creative resource rather than a problem. So while society might 'speed up' due to increased acceleration[60] and temporalisation[61] the law will also have to speed up, while never going as fast as the rest of society.[62] Hence the law is, for structural reasons, bound to become more 'transformative'. It follows that the notion of law's constitutive character for economy as presently advanced at Yale is both falling too short and going too far.[63] Falling too short, because the form giving function of law is not particular to the economy but rather can be observed in relation to a far broader host of social processes, including, as previously highlighted, political processes. However, it is also going too far, because law only produces a 'soft constituent effect' for non-legal social processes. When a social exchange is given a contractual form, it allows for that particular social exchange to be denoted an economic exchange. In this sense, one might say law constitutes 'the economic' but only as a secondary co-constitutive exercise, as it might reinforce and condense but not create such exchanges.

The dual function as simultaneous differentiator and interconnector might be considered as based on connectivity norms. The concept of connectivity norms was originally developed in order to capture the role of law in the separation, transmission, and incorporation of components of meaning from one context to another in a globalised world, as for example undertaken through global value chains spanning several legally defined societal contexts and jurisdictions.[64] However, in an additional variant connectivity norms might also be considered as instruments aimed at horizontal separation, transmission, and incorporation of components of meaning between systemically organised processes of, for example, an economic, political, religious or scientific nature. This is, for example, expressed in the extraction, transfer and incorporation of economic

[59]For elements of a theory see; P Kjaer 'Systems in Context: On the Outcome of the Habermas/Luhmann-Debate' September (2006) Ancilla Iuris 66–77; PF Kjaer, 'Law of the Worlds – Towards an Inter-Systemic Theory' S Keller, S Wipraechtiger (Hrsg.), *Recht zwischen Dogmatik und Theorie. Marc Amstutz zum 50. Geburtstag* (Dike Verlag 2012) 159–75; Kjaer, 'How to Study Worlds: Or Why One Should (Not) Care about Methodology' 208–22.

[60]H Rosa, *Beschleunigung. Die Veränderung der Zeitstrukturen in der Moderne* (Suhrkamp 2005).

[61]N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag 1997) 997ff.

[62]PF Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge 2014) 104ff.

[63]JS Purdy et al, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' 129 (2020) Yale Law Journal 1784–835.

[64]PF Kjaer, 'Constitutionalizing Connectivity: The Constitutional Grid of World Society' 45 (S1) (2018) Journal of Law and Society 114–34, 126.

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capital raised through tax law into the political system, or the extraction, transfer and incorporation of components of scientific knowledge into the economic system through their conversion into technologies with the help of patent law.

In the social sense, the law plays a crucial role in facilitating social exchanges, such as the purchases of goods and services, or conversely, preventing social exchanges such as the use of violence or the spread of defamatory statements on social media. The social dimension is also crucial for reflexive law's attempt to increase the ability of social processes to include the societal effects of their activities in their organisational forms, decision-making processes and values. However, this perspective can be broadened through an understanding of law as 'infrastructural law', understood as the grid and the channels through which administrative, economic, mass media and other social processes are conducted, and that in two ways.

First, through a conceptual detachment of the concept of public law from the concept of the state. As already indicated, the 'state' or the 'public sector' is an indefinable quantity that has always been 'fluid' acting as one legal form provided to political power, among others. The 'fluidity' is, both historically and today, expressed in the active role private actors have played in the production of, for example, welfare services and the construction and operation of infrastructure.[65] That is the case of private water supply and railways, outsourced elderly care, of private hospitals and Google's search engine. In addition, there are more sources of public law than just state law. EU law, for example, produces legal norms of a public law nature with direct legal effect. State law and public law are therefore not identical as public law goes beyond formal state institutions. A concept of 'legally constituted public power' provides a broader, yet more targeted and precise approach, deployable in a wide range of local, national and transnational settings, as well as in relation to formally public and to formally private institutions. Hence, 'legally constituted public power' exists wherever power is abstracted, ie de-personalised, and generalised through legal means, making it distinct from atomistic and informal privatistic power.[66] Privatistic power is, in this sense, the broader category, as such power is intrinsic to all social processes and exchanges, while legally constituted public power is a specific type of power that might or might not be unfolded in a given setting. In contrast to Hobbesian and Hegelian approaches, the epistemological point of departure is therefore not public power, described as state power by Hobbes and Hegel (as visible in their understanding of public power as a holistic frame encapsulating private power). Rather, privatistic power is manifest throughout society, with legally constituted public power appearing as islands in this ocean of private power. In stricter legal terms, public power might therefore be observed wherever the norms and standards of 'public interest', and the areas that fall under administrative law and related areas of law, are applied. For example, private providers of public services or privately owned 'critical infrastructure', regardless of whether public law originates from a national capital or from Brussels, Strasbourg or elsewhere, just as both public and private international organisations might be included. The easiest, and perhaps only way to define 'the public' in legal terms will, therefore, be that the public 'is' where administrative law and related legal fields apply. As expressed in the concepts of 'global administrative law'[67] and 'private administrative law'[68] such law is moreover present and observable in a multitude of settings throughout world society. The consequence of this optic is that Google Inc., for example, should not simply be observed as an organisation with a one-dimensional obligation

[65]G Thompson, 'The Constitutionalisation of Everyday Life?' in E Hartmann and PF Kjaer (eds), *The Evolution of Intermediary Institutions in Europe From Corporatism to Governance* (Palgrave Macmillan 2015) 177–97.

[66]PF Kjaer, 'Why Justification? The Structure of Public Power in Transnational Contexts' 8 (1) (2017) Transnational Legal Theory 8–21.

[67]S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' 37 (2005) New York University Journal of International Law and Politics 663–94; B Kingsbury et al, 'The Emergence of Global Administrative Law' 68 (2005) Law and Contemporary Problems 15–62.

[68]R Vallejo, 'After Governance? The Idea of a Private Administrative Law' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 320–47.

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to produce shareholder value. Rather Google – like the postal service in the old days – can be understood and regulated as a multi-faceted institution with a number of – potentially – conflicting societal obligations that can be identified and given form through regulation and which it will be Google's task to balance on the basis of a concept of stakeholder value. The task of the law is, in other words, to transform Google from an organisation to an institution on the basis of an understanding of legally constituted public power as an infrastructure that spans the distinction between the private and the public.[69]

Second, through a spatial turn in law. The legal theoretical focus in the last four decades has, as expressed in reflexive law, been on the proceduralisation of the law, ie on the time dimension of law. Today, however, there is an increasing focus on 'the cohesiveness of society', as expressed in discourses on inequality and geographical imbalances. Social spaces, symbolically defined through geographical markers, thereby become a central dimension in the projection surface on which law has its cognitive focus. Nationwide coverage obligation for telecommunications and electricity providers are classic examples, but can, in principle, be unfolded in a manifold of cases. For example, in relation to welfare services as a legal obligation to ensure a maximum distance from residence to nearest hospital and general practitioner, and in relation to a maximum distance to nearest educational institution in order to achieve a transformation of spatial relations in rural areas. The spatial dimension might, therefore, also be considered as based on a concept of coherence norms, ie norms that, from a 'traditional' sociological perspective, tend to be seen as 'instruments of collectivity'. Norms which are oriented towards the establishment of coherence within a group, for example a legally defined corpus of citizens, through the prescription of specific actions considered desirable for the members of the group, with the aim of transposing these the norms in question into the future.[70]

In a temporal sense, the intention of proceduralisation in reflexive law was a way to deal with increasing societal complexity by focusing on the development of procedures for decision-making processes without entering into the substance against which the decision-making processes were oriented. The law should thereby become more agile, adaptive and dynamic and better at responding to societal change. While the proceduralisation mindset has many advantages, there is a basis for expanding the temporal horizon through the development of a legal concept of sustainability, in both individualised and societal sense, that can serve as a unifying optic for a broad host of societal processes and problem constellations, such as environmental, social, health and economic issues. At the individual level, sustainability implies a focus on 'the whole life', ie on a person's total life expectancy. Labour market affiliation and conditions will thus have to be seen in a perspective that implies maintaining a certain minimum standard of living for life, with the implications it has for pension schemes. Occupational, health-related illnesses, such as stress, will have to be considered on their long-term implications throughout life and the value of education will have to be assessed on the basis of the long-term effects, rather than on the immediate employment rate and income of recent graduates.

From a societal point of view, sustainability is closely linked to the generational perspective, the implications of current activities for future generations. The generational perspective is already central to both fiscal and environmental policy, where the long-term sustainability of contemporary dispositions has been a theme for a long time. The transformative potential of law in this context lies in its ability to provide a framework for contemporary action on the basis of a future perspective. Albeit not very successfully, that is for example the motivation behind the EU's Stability and Growth Pact for fiscal policy.[71] The statutory phasing out of internal combustion

[69]PF Kjaer, 'From the Private to the Public to the Private? Historicizing the Evolution of Public and Private Authority' 25 (1) (2018) Indiana Journal of Global Legal Studies 13–36.

[70]Kjaer (n 64) 114–34, 126.

[71]Kjaer (n 27) 'European Crises of Legally-Constituted Public Power: From the "Law of Corporatism" to the "Law of Governance"' 417–30, 427f.

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engines in the EU by 2035 within climate law might also be considered as based on a notion of sustainability embedded in a transformative law approach.[72] The ongoing legislative process concerning a directive on due diligence might be understood in a similar way.[73] The law can thus set goals for the future that serve as a guideline for present dispositions and thus initiate a transformative process. An objective function that the law is potentially better at fulfilling than the political system which works with a shorter time horizon governed by 'cases', opinion polls and the next election campaign, whereas the law can relate relatively indifferently to the short-term political and economic costs of long-term dispositions. Transformative law in this sense might provide principles of selection in the course of societal evolution. The tri-partite distinction between variation, selection and retention is at the core of evolutionary understandings of society. From moment to moment, a multitude of social processes unfold through selection of the next operation, ie one payment produces another payment and one administrative decision feeds into other administrative decisions, while societal complexity implies that there always is more than one option available. Not taking a decision is, for example, also a decision. Hence, the need for selection criteria for choosing between one or the other payment, or between this or that decision. The temporal perspective might be understood as based on a concept of possibility norms. Possibility norms introduce a distinction through a distance to the factually existing social reality as perceived in a given social context, by introducing a contra-factual perspective. As such, possibility norms are instruments through which possible alternatives to the given social reality are unfolded, thereby marking possible futures and accentuating the openness, rather than the reticence, of the future.[74] The aspirational texts and statements based on an ever-expanding list of rights characterising many contemporary constitutions, as well as the formulation of the UN Sustainable Development Goals, are typical examples.

Going into more detail and distilling its content, ten core characteristics of transformative law and its partial overlap with previous types of law, especially reflexive law, can be highlighted as follows.

A. Societal unit

The 'law as purpose' approach had the idea of the nation state and its related *Volksgeist* as its core societal unit. 'Law as a tool' tended in its initial interwar setup to focus on particular social groups, such an ethnic group, a profession, a social class or a 'race', as the central societal unit often combined with the claim that the particular group in question had a particular standing making it the core of society. The universal post-1945 Western European version of 'law as a tool' was, moreover, closely linked to a correspondence between state and society or a 'societal state' within a neo-corporatist nation state framework, thereby making this extended form of statehood the core societal unit.[75] This form of statehood remained intrinsically linked to transnational constitutive processes, to a degree that allows us to talk about a transnational constitution of the extended nation states.[76] The transnational constitution of nation states, moreover, played an essential role in the 'law as an obstacle' approach. Starting with the 1976 IMF bailout of the United Kingdom, international organisations acted as the avant-garde in the introduction of structural liberalist reforms of the kind associated with the 'law as an obstacle' approach.[77] Nonetheless, 'law as

[72]GSM Pratti, 'Bad Moon Rising: the Green Deals in the Globalization Era' 1 (2021) Rivista quadrimestrale di diritto dell'ambiente 177–96.

[73]See the contribution of Marija Bartl in this issue.

[74]Kjaer (n 64) 114–34, 126.

[75]PC Schmitter, 'Still the Century of Corporatism?' 36 (1) (1974) The Review of Politics 85–131.

[76]JE Fossum and AJ Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman & Littlefield 2011).

[77]D Wass, *Decline to Fall: The Making of British Macro-economic Policy and the 1976 IMF Crisis* (Oxford University Press 2008).

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an obstacle' observed the world through a one dimensional economic prism and, as such, only saw economic entities and agents acting as market participants, or entities and agents mimicking economic entities and actors. The market was in other words conceived of as the central societal unit. Reflexive law is global law unfolding within world society.[78] While, in principle, being global in nature, globality is however not the primary concern of reflexive law. Rather, the central focus is on functionally delineated systems and regimes. It is the internal dynamics and rationalities of these systems and regimes that are conceived of as the drivers of societal evolution, just as the systemic boundaries are the central conflict lines of society, thereby making functional delineated systems and regimes the central societal units. Transformative law, however, turns this relationship between world society and systems and regimes upside down. The epistemological point of departure of reflexive law is functional systems and regimes. It is through these systems and regimes that the world is observed. Transformative law, on the other hand, departs from 'the world' as especially observable in relation to discourses on environmental law, especially climate law, or what might be termed antrophogenic law. However, this world, paradoxically, consists of many worlds, as for example expressed in a strive to recognise 'silent epistemologies' operating outside euro-centric and modernist social praxes. The number of organising principles of such worlds are, therefore, quite broad ranging from functional to segmentary and stratificatory differentiation.[79] Irrespective of their organising principle, such worlds can however be understood as constituted in a dual sense. Firstly, a 'world' is a social phenomena consisting of an 'inner world' and a horizon,[80] or a social system *and* its context.[81] In addition, 'worlds' are 'double worlds' in the sense that they simultaneously are factually existing functional worlds and contra-factually existing normative worlds. The dialectical tension between these two world dimensions are, furthermore, considered the essential driving force of social evolution and hence of societal dynamism.[82] In this context, a central, third function, of law emerges through a multi-dimensional conflicts of law, or an 'in-between worlds' law,[83] aimed at establishing compatibility and the possibility of transfers between such worlds. 'Global law' can, in this context, be understood as a specific inter-contextual and non-territorial subspecies of law aimed facilitating the extraction, transfer and incorporation of components of meaning from one world to another.[84]

B. Form of rights

In 'law as purpose' approaches individual rights between formally equal subjects situated in 'civilised' nation state settings, thereby, in most instances, excluding colonial settings, were at the centre. Collective rights, in contrast, were, as mentioned, at the centre of many 'law as a tool' approaches emphasising the rights of particularistic groups. After 1945 this notion of rights, however, changed with the move to universal across the board welfare regimes. In the 'law as an obstacle' approach the primary bearer of rights was the economic actor, such as the employee or service provider in EU internal market law. Multinational companies were, in this context,

[78]G Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in G Teubner (ed), *Global Law without a State* (Dartsmouth 1996) 3–28.

[79]N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp 1997) 332ff.

[80]MA Belousov, 'On the Problem of the World in Husserl's Phenomenology' 54 (1) (2016) Russian Studies in Philosophy 20–34; E Husserl, *Lebenswelt. Auslegungen der vorgegebenen Welt und ihrer Konstitution. Texte aus dem Nachlass (1916–1937)* Hrsg. Von Rochus Sowa (Springer 2008) 246–56; L Landgrebe, 'The World as a Phenomenological Problem' 1 (1) (1940) Philosophy and Phenomenological Research 38–58.

[81]P Kjaer, 'Systems in Context: On the Outcome of the Habermas/Luhmann-debate' September (2006) Ancilla Iuris 66–77.

[82]See in particular H Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury 2014).

[83]M Amstutz, 'In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning' 11 (6) (2005) European Law Journal 766–84.

[84]Such extraction, transfer and incorporation of components of meaning between different worlds is however intimately connected with asymmetric power structures and substantial divergences in discourse defining capabilities. For more on this see; Kjaer (n 8) 302–18.

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increasingly able to stage themselves as bearers of rights as well.[85] The social category of the consumer, moreover, became the normative focus point.[86] In 'law as reflexivity-initiation', the 'systemic agent', linked to the social roles of different systems, such as 'the believer', 'the citizen' and 'the employee', is the bearer of rights, on the basis of a notion of strict systemic equality. Systemic agents do not necessarily have to be designated as 'humans'. Any agent, also animals and electronic agents, fulfilling a systemic role might take this role.[87] Transformative law could go a step further, through a multi-species approach, also including plants, fungi, bacteria, or even viruses in addition to animals, humans and electronic agents.[88] Any 'form of life' thereby, in principle, becomes bearer of rights, with the obligation to protect its integrity enshrined in law. This perspective links up to a 'world studies approach', allowing for a broader range of categories of social entities when compared to the system theoretical focus on functionally delineated systems. In addition, it implies a gradualisation of the distinction between social systems and the psychic systems associated with humans, as well as between social systems and biological systems of animals, plants, and so forth, that are at the center of systems theoretical inspired approaches.

C. Notion of equality

'Law as purpose' relied on a strict formalistic idea of equality of legal subjects. 'Law as a tool', on the other hand, foregrounded particular groups, either to make up for perceived disadvantages or because they were seen as avant-garde structures of society. 'Law as an obstacle' involved a return to a neo-formalistic setup, emphasising formal equality, while also limiting it through a foregrounding of economic actors. 'Law as reflexivity-initiation', on the other hand, focused on the equality of 'systemic actors' linked to social roles, such 'the consumer' in the economy, 'the voter' in the political system, the 'legal subject' in the legal system, and so forth. Transformative law, foregrounds the generational aspect. Linked to the notion of sustainability inter-generational equality becomes the central notion of equality materialised through maintenance and future access to economic, environmental, health and social resources. This perspective is derived from broader societal concerns, such as, for example, whether the standard of living of previous generations can be maintained, the degree of depletion of natural resources and its impact on future generations. These are questions that, justified or not, are dominating the broader public discourse these years in certain parts of the western world. It is, moreover, combined with the aim to maintain the diversity of non-social and non-human forms of life as an objective in itself and the future maintenance of current forms of life and even the obligation to engage in de-extinction, the recreation of forms of life that have become extinct because of societal activities.[89]

D. Legal ideal

As reflected in the term 'law as purpose', classical legal scholars regarded the perfect legal regulation of social life as a purpose in itself. The ideal of law was a perfectly coherent system based on deduction organising a perfectly legally regulated world. 'Law as a tool' oscillated between the

[85]S Steininger and J von Bernstorff, 'Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate 'Human' Rights in International Law' in I Venzke and KJ Heller (eds), *Contingency in International Law. On the Possibility of Different Legal Histories* (Oxford University Press 2021) 281–96.

[86]N Olsen, *The Sovereign Consumer: A New Intellectual History of Neoliberalism* (Palgrave Macmillan 2018).

[87]G Teubner, 'Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law' 33 (4) (2006) Journal of Law and Society 497–521.

[88]SE Kirksey and S Helmreich, 'The Emergence of Multispecies Ethnography' 25 (4) (2010) Cultural Anthropology 545–76.

[89]NF Carlin et al, 'How to Permit Your Mammoth: Some Legal Implications of "De-Extinction"' 33 (3) 2014 Stanford Environmental Law Journal 3–57.

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vision of a world unified through political acts without the need to rely on legal means, ie the ideal of law being the absence of law, and a vision of the world where law was merely a tool for political action, with law leaving no independent imprint on the world. 'Law as an obstacle' followed along with the ideal of law as marked by its absence. In the ideal world, the market would enable an optimal form of social exchanges without the help of legal instruments and if, as a secondary option, law was needed, the ideal would be the unfolding of law on the basis of economic principles and with the help of economic tools as expressed in the turn to 'law and economics'. 'Law as reflexivity-initiation' saw the legal ideal in the maintenance of a functionally delineated society. Transformative law sees the legal ideal in the epistemological visualisation and invigoration of 'worlds'. This is, for example, highlighted in a broad spectrum of post-colonial legal discourse, where the law is seen as an instrument potentially able to assist in breaking the muteness of non-western forms of social organisation, through acts of recognition and by providing platforms, visualising and privileging such forms of communication. In a similar vein, the 'soft constituent effect' of law, constituting social processes by transforming loose couplings into tighter couplings also has an epistemologically visualising and invigorating effect. Transformative law might, therefore, also be understood as 'platforming law' and thus also potentially as 'deplatforming law', aimed at foregrounding some worlds and de-emphasising others.

E. Normative idea

'Law as purpose' was classical modernist law aimed at driving forward the wheels of history on the basis of the full vocabulary of enlightenment and progress. 'Law as a tool' represented a radicalisation of this idea through the introduction of the idea that revolutionary avant-gardes and other political groupings could speed up and even direct the course of history, with the aim of arriving at a nirvana style state of affairs in a not-too-distant future. 'Law as an obstacle', on the other hand, was based on a vision of society as a market characterised by perfect competition and in perfect equilibrium, a state where supply equals demand. 'Law as reflexivity-initiation' had as its normative ideal a society where the multitude of systemic rationalities are unfolded to their fullest, including through a potential complete inclusion of all humans via corresponding social roles and where, with the help of law, function systems take adequate account of the externalities they produces via-a-vis each other. A society which, due to its functional pluralism, was considered inherently anti-totalitarian. Transformative law has a sustainable society as its ideal, ie a society capable of supporting processes continuously over time in a manner which does not reduce the life-prospects of later generations. The ultimate ideal is, thus, a circular society where all biological, physical and social resources utilised undergo a reprocessing that allows for their reuse, to the extent that it does not reduce or deplete the resources available in the future. This perspective has, furthermore, been linked to issues of strategic autonomy and resilience, as for example is the case of plans for energy transitions, such the EU Green Deal.[90]

F. Governance idea

'Law as purpose' in the Savigny tradition had private law as its primary focus point, understanding it as an expression of a societal *Volksgeist*. Hence, the idea of governance was the nation state but with the state guided by the nation rather than the nation being guided by the state. 'Law as a tool' had corporatism and, after 1945, neo-corporatism as its core idea of governance, with classical corporatism having a focus on societal rather than state corporatism. 'Law as an obstacle' approaches had the spontaneous order of the market combined with a minimal state, safeguarding the autonomy of the market as its core governance idea. 'Law as reflexivity-initiation' had, as mentioned, the regulation of self-regulation as the primary lens through which the question of

[90]Pratti (n 72) 177–96.

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governance was approached. In contrast, transformative law has its core focus on inter-contextual and inter-legal arrangements aimed at handling the recognition, visibility and accommodation of a multitude of different worlds within the singular world of the Anthropocene.[91] That is for example reflected in the focus on the status of indigenous peoples, and the compatibility of their modes of organising with legal orders of settler origin, or through highlighting the connectivity and synchronisation of multiple societal contexts through global value chains.

G. Legal core

As already highlighted and meticulously pointed out by Duncan Kennedy, private law was the legal core of 'law as purpose' approaches, while 'social law' took centre stage in 'law as a tool' approaches. 'Economic law' in national and international formats, combined with a semantic of constitutionalisation, was the central focus point of 'law as an obstacle' approaches. 'Law as reflexivity-initiation' is the quintessential societal law derived from social norms making it a kind of social law though without the focus on a particular social group. The move to transformative law, on the other hand, implies foregrounding 'sustainability law', most notably environmental law, but also forms of economic law encompassing broader socio-economic concerns related to societal coherence and (in-)equality. Transformative law might, therefore, also be understood as 'woke law', in the sense that it seeks to bring attention and awareness to a diverse set of issues, ranging from animal rights to gender and racial discrimination. As already indicated, an expanded version of administrative law, transcending the private/public divide and the triangular local/national/transnational distinction, moreover becomes the core tool. This is the case as administrative law, in many ways, acts as the skeleton providing legally constituted, abstracted and generalised public power with institutional repositories, allowing it to address issues of societal coherence due to its harmonising and synchronising effects.

H. Boundary

'Law as purpose' defined itself through its positivist boundary vis-à-vis morality and with that political and religious influence. 'Law as a tool' had the relation of law to the wider society as its contested boundary, with law serving the purpose of society and not the state. 'Law as an obstacle' had the insulation of economic processes from politics at its centre and as such had the law/politics distinction as its central line of contestation. 'Law as reflexivity-initiation' relied on the law/environment distinction as its central boundary. Each system has an environment it needs to observe and internally process. Transformative law, instead, addresses the relation between law and the multitude of worlds. Worlds which are constituted through law, but also are where law is derived from.

I. Legal instrument

'Law as purpose' had codes of law, in particular civil codes, as their preferred legal instrument. As meticulously analysed by Franz Neumann, 'special legislation', purpose-driven legal instruments, was at the centre of 'law as a tool' approaches.[92] 'Law as an obstacle', on the other hand, invoked constitutionalising semantics with the aim of insulating certain social, most notably, economic activities from external interference. 'Law as reflexivity-initiation' relied on procedural frameworks aimed at fostering self-regulation. Transformative law, by contrast, is 'future law' based on transformative targets to be achieved at a given point out in the future, as for example

[91]Ibid.

[92]See especially FL Neumann, 'The Change in the Function of Law in Modern Society' in WE Scheuerman (ed) *The Rule of Law under Siege. Selected Essays of Franz L. Neumann & Otto Kirchheimer* (University of California Press [1937] 1996) 101–41.

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reflected in the Paris Agreement on Climate Change, the EU Green Deal and energy transition legislation in general.

J. Legal agency

'Law as purpose' has the law professor as its proclaimed hero. The legal scholar engaging in the production of the grand civil codes of the 19th century. 'Law as a tool' had the legal sociologist going back not only to Émile Durkheim and Max Weber but also to Rudolf von Jhering and Eugen Ehrlich, as their original heroes, followed up by a broad range of labour lawyers and other protagonists of social law actively engaged in labour union struggles. 'Law as an obstacle' had the judge and litigants at the centre. 'Law as reflexivity-initiation' tuned to extra-legal drivers, NGO's and other social movements driving change through scandalisation and media attention. Transformative law adds to this the 'expert' as a central driver of legal change. The Intergovernmental Panel on Climate Change and pandemic experts are here a case in point. Hence, transformative law is 'scientific law' with a strong reliance on cognitive rather than normative processes of knowledge creation. This is also reflected in issues such as environmental, socio-economic and technology related issues, and the call for knowledge-based solutions. But even more so in the very idea of transformation, ie of change, as cognitive knowledge is knowledge which is systematically structured along the principles guiding scientific knowledge generation, meaning knowledge which is under current scrutiny and in constant flux with 'old knowledge' continuously replaced with 'new knowledge'.[93]

8. Conclusion

Law has always been changing. Historically, law has been understood as an objective, as a tool, as an obstacle and as a mechanism of reflection. Especially after the NPM and NPG revolutions, the law has however been strategically marginalised through a dilution of its norm-setting function in society. The consequence is that fertile ground has emerged for a wide range of societal problems to keep growing, just as the ongoing de-centering of the western-centric world has created a new problem constellation in society and, thus, a demand for new types of norms in both a formal and substantial sense. It is on this backdrop that the possible development of a concept and praxis of transformative law, focused on law as a form-giving exercise, is emerging. A legal concept of transformative law that has both a substantial, a social and a time dimension, extending beyond the pure temporal focus which is the main element in reflective law.

Transformative law is however a potentiality rather than a reality.[94] Structurally, its emergence is driven forward through increased acceleration and temporalisation of society. The current state is, however, one of a multitude of ongoing legal developments in scholarship, praxis and legislation providing fragments that might or might not amalgamate into a fundamental new episteme of transformative law. Were it to obtain dominance, it would potentially provide the foundation for a new époque of legal evolution, markedly different than the types of law dominant in previous époques. The chances of this happening are wide open and dependent on the combination of many factors of both a legal and extra-legal nature and is, as such, contingent. It can become the defining episteme of law for decades to come or just remain a short semantic blip that will have disappeared from the radar in a few years from now. The determining factors are likely to be the structural conditions of the 21st century world society, as well as the dominating perception of pressing problems and the ensuing flux of problems, as issues currently thought to be high on the agenda for decades to come potentially will be seen in a different light down the road. The relative

[93]N Luhmann, *Rechtssoziologie* (Verlag für Sozialwissenschaften [1972] 2008) 80ff.

[94]For the concept of potentiality see; N Åkerstrøm Andersen and J Grønbæk Pors, 'Transformation and Potentialization: How to Extend the Present and Produce Possibilities?' (Published ahead of print 11 August 2022, Kybernetes).

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Table 1. The five types of law

	Law as Purpose	Law as a Tool	Law as an Obstacle	Law as Reflexivity-initiation'	Transformative Law
Societal unit	Nations	Social groups	Markets	Function systems	World society
Form of rights	Individual rights	Collective rights	Rights of economic actors	Rights of systemic agents	Multi-species rights
Notion of equality	Formal equality between individuals	Assymmetric equality between groups	Formal equality of economics actors	Formal equality of systemic actors	Symmetric equality between generations
Legal ideal	Coherent legal regulation of society	Unrestrained political action	Frictionless market exchanges	Upholding functional differentiation	Epistemological visualisation and invigoration of 'worlds'
Normative idea	Enlightenment	Progress	Market equilibrium through perfect competition	Complete unfolding of systemic rationalities	Sustainability
Governance idea	Nation states	(Neo-) corporatism	Spontanous market order	Regulation of self-regulation	Inter-legality
Legal core	Private law	Social law	Economic law	Societal law	Administrative law
Boundary	Law and morality	Law and society	Law and politics	Law and other social systems	Law and worlds
Legal instrument	Civil codes	Special legislation	Constitutionalisation	Procedualisation	Target based 'future law'
Legal agency	The law professor	The legal sociologist	Judges and litigants	Social movements and NGOs	Experts

location and concentration of power, resources and knowledge will also be central. As pointed out by Duncan Kennedy, classical legal thought mainly had a German origin. 'Law as a tool' conceptions were heavily French inspired and 'law as an obstacle' had close links to the US context. But where will transformative law come from? In its self-description, it is likely to see itself as truly global with no enshrined bias vis-à-vis different cultures, languages or regions of the world. In praxis that is, however, likely to be different. EU law and the scholarship surrounding it is an obvious contender in the battle for occupying the driver's seat but there will be other competing variants as well. No matter which variant obtains dominance, blind angles will be present.[95]

The normative desirability of transformative law is also open for contestation. This largely will depend on the actual form it will take in the concrete contextual settings where it might manifest itself. 'Law as a tool' was a cross-over movement which manifested itself in widely different ideological and institutional practises ranging from anarchist to extreme totalitarian over progressive socialist to social democratic appearances. In a similar way, transformative law might become a vehicle for both activist, communitarian, fundamentalist, pluralist, totalitarian and, through the attempts of re-engineering past developments, also novel forms of reactionary activity. In a similar vein, and just as 'law as a tool', its different strands might subscribe to democracy and democratic ideals or not, just as its degree of alignment with classical liberal rule of law ideals will be a central

[95]A good example of the potential of EU law in this regard is the European Commission's 'Proposal for a Directive on Sustainable Due Diligence' from 23 February 2022. For more on this see the contribution of Marija Bartl in this special issue.

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characteristic of its different strands. The concrete forms it might take is, moreover, likely to be decisive for its degree of sustainability. Albeit having 'sustainability' at its centre, transformative law might, at least in some of its versions and somewhat ironically, turn out to be unsustainable.

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