The Public-Private Challenge: The Role of Private Actors in Defining, Safeguarding and Implementing Public Interests

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This special issue of the *Erasmus Law Review*, dedicated to the role of private actors vis-á-vis public interests, collects some of the articles first presented in Rotterdam during the annual conference 'The Public-Private Challenge: Innovating Legal and Regulatory Paradigms', as well as the articles accepted from an open call for them. The result is a wonderful blend of contributions from academics from different universities and legal and empirical disciplines reflecting on questions such as what defines public interests and what distinguishes them from private interests (to the extent such private interests do exist); what consequences are attached to the qualification of a particular interest to be a public one; what roles private actors play in creating, promoting, implementing and enforcing public interests; how the power of private actors can be made subject to public interests in a globalised and digitalised world; how we can redefine, if at all, the line that is traditionally dividing public from private law; and what do the major challenges of these times such as climate change, globalisation and digitalisation mean for the public-private challenge?

Safeguarding and implementing public interests are defining challenges of our time. All United Nations Sustainable Development Goals aim to reduce horizontal and vertical disparities between groups, individuals, governments and private organisations, because these inequalities are barriers to (among others) sustainable economic growth, decent work, natural resource conservation, land, water and air restoration, and to inclusive societies and institutions. Even the democratic systems that hold dear the principle that everyone is equal before the law have not yet been able to sufficiently reduce these inequalities. This task requires all sectors and actors in society to contribute, including the law and lawyers.

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After decades of internationalisation of economic and financial relations, digitalisation, deregulation and liberalisation, private entities have become fundamental to both the commons and the state, resulting in power distributions and inequalities. Because of conscious policy choices or nation-states' inability to face transnational challenges, states have partially withdrawn from defining, implementing and enforcing public interests. This has led private actors to succeed into former public functions, unsettling the overall public-private power balance and creating new inequalities among private actors. More recently, a revaluation of the public sector seems underway. The legal discipline should not be a distant observer of this development. As an instrument used for both consolidation and change, the law can be a powerful tool to recognise and remediate inequalities, including these between public and private interests and actors. This requires innovative legal research into new modes, means and models of governance that promote equal access to the benefits of evolutions such as globalisation and digitalisation and to the means of addressing crises on the ecological, health and other fronts.

At both Erasmus School of Law and the Faculty of Law of Groningen University, the steady and successful growth of research on the interplay between and public and private interests and actors was given an extra boost with the establishment of the cross-disciplinary research programmes Rethinking Public Interests in Private Relationships and Rebalancing Public & Private Interests, together called 'The Public-Private Challenge',[1] funded by the Dutch Sector Plan for Law.[2]

This plan embraces the idea that Dutch legal academia has the potential to be a global thought-leader on the role of private actors in the context of public interests. The advanced integration of private actors in the public domain and the embeddedness of the Netherlands in the European Union and international organisations and Treaties provide the perfect setting to study the rebalancing of public interests in private relationships.

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1 For more information about our joint initiative see: https://publicprivatechallenge.nl/about/.

2 For more information about the Sector Plan see: https://www.sectorplan-ssh.nl/.

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constitutes a follow-up to the previous Public-Private Challenge special issue in the *European Journal of Comparative Law and Governance*[3] and collects some of the articles first presented in Rotterdam during the annual conference 'The Public-Private Challenge: Innovating Legal and Regulatory Paradigms', as well as the articles accepted from an open call for contributions.

The result is a wonderful blend of contributions from academics from different universities and legal and empirical disciplines reflecting on questions such as what defines public interests and what distinguishes them from private interests (to the extent such private interests do exist); what consequences are attached to the qualification of a particular interest to be a public one; what roles private actors play in creating, promoting, implementing and enforcing public interests; how the power of private actors can be made subject to public interests in a globalised and digitalised world; how we can redefine, if at all, the line that is traditionally dividing public from private law; and what do the major challenges of these times such as climate change, globalisation and digitalisation mean for the public-private challenge?

Beyond these overarching questions, three distinct but intertwined concepts constitute the core of the public-private divide and the gravitational forces that bind the six articles of this special issue together: actors, interests and power(s).

In the first article, Ander Maglica explores – from a comparative perspective – whether public goals can be fostered by private actors through public interest litigation. Maglica posits that, although imperfect, different procedural techniques of public interest litigation (i.e. constitutional review, the pilot-judgement procedure and class actions) can advance minorities' rights, equality and societal change.

The second article, authored by Monika Glavina, is, to a certain extent, the flipside of the first one. Building on theoretical and empirical evidence, Glavina demonstrates how 'private-interest actors' (i.e. for-profit actors) are leading players in EU legal mobilisation and act as catalysts for action under public law via the preliminary procedure. Glavina, furthermore, critically raises the question of the power and role of private actors in ultimately shaping legal integration in the EU.

In the third article, María Carlota Ucín reflects on the right to access to justice and advances a proposal to regulate third party litigation funding as a means to partially fill the gaps left open by the retreat of the welfare state and the parallel move towards privatisation. According to Ucín, under certain conditions and in combination with other strategies, third party litigation funding can help to guarantee access to justice, foster other human rights and even function as a mechanism for public interest litigation.

In the fourth article, using empirical evidence from the Netherlands, Jessie Pool pleads for re-purposing the goal of bankruptcy proceedings. Pool suggests that, in order to promote sustainable liquidation in these proceedings, it is necessary to implement a multistakeholder perspective in which stakeholder interest can override the interests of the creditors. In this article, the public-private divide takes new shades of meaning as it becomes evident that traditional public interests (e.g. the protection of creditors) must recede in the face of new, possibly overriding, public interests such as sustainability or the protection of human rights.

In the fifth piece, Pamela San Martín, building on her own experience as a member of Meta's Oversight Board and on the theoretical framework provided by international human rights law, explores the limits of and difficulties associated with content moderation in and by digital platforms. Although thematically restricted to the issue of content moderation, San Martín's article sheds light on the problems surrounding the regulation of transnational private power (e.g. platforms) in the absence of a clear transnational public power.

Paul Kjaer closes the issue with a *postscriptum* in which he critically analyses the previous five articles in the light of the concept of transformative law, that is, an alternative to the dominant twin-episteme of law and economics and human rights, normatively oriented to the constitution of an economically, ecologically and socially sustainable global society. Kjaer argues for the abandonment of the public/private power vocabulary and its replacement with the notions of legally constituted public power and societal power.

What do these six wonderful works have to say about our 'Public-Private Challenge'? Has the public-private language lost its appeal and usefulness, and are we in dire need of new epistemes and languages? Should we, as René Repasi suggests, no longer speak of private and public interests but of interests that eventually get promoted to public ones. Should research, then, not rather focus on how such promotion takes place, what consequences are attached to such a promotion and what roles private actors pursuing *per se* their own (private) interests play in defining and implementing public interests?[4] Where does 'the common' stand in the public-private dichotomy? Complex questions fitting the challenge we have taken upon that will certainly inform our research agenda in the coming years.

3 Special issue hosted by the *European Journal of Comparative Law and Governance*, available at: https://brill.com/view/journals/ejcl/9/2/ejcl.9.issue-2.xml.

4 R. Repasi, 'The Concept of the Public and Private Interests in EU Law', Inaugural lecture Erasmus School of Law, Rotterdam, 17 March 2023, available at: https://eur.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=7bc9accc-89ed-4ae6-b193-af5b00a582d9.

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