

Introduction Security in transnational spaces: legal and political questions in Europe

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Introduction: why transnationalism (now)?

This edited book builds on the research published within the Special Issue (SI) entitled 'European transnationalism between successes and shortcomings: Threats, strategies and actors under the microscope' of the *Journal of Contemporary European Studies* and two additional studies published in the same journal that pertain to the same research area *lato sensu*. Specifically, this book is designed to bridge the seeming understanding gap between political science and law in relation to security challenges. This gap becomes apparent when one looks at terms, concepts or even methodologies that might be well-established in both those fields of research and studies but have a completely different meaning or are associated with substantially different focal points. Such a divergence and lack of consistent dialogue, we believe, is not problematic for the academic debate alone but may have important policy implications. We specifically focus on the case of transnationalism in the European Union (EU) as while the Member States (MSs) still retain primary competence for protecting their citizens against security threats, the current security narrative, as shaped at EU level, allows for a number of questions to emerge. How do challenges enter the security realm? How are they therefore understood and managed in a transnational space where the traditional understanding of borders and territories – both critical concepts in law and politics – is put into question? How are the EU security actors operating in response to increasingly borderless challenges and what instruments are developed?

Overall, this book makes a timely contribution as, despite the popularity of generalised narratives on 'European' approaches to security, the way security is understood, addressed and practiced vis-à-vis different issues deserves a multidisciplinary discussion disaggregating different levels of analyses. The intention is to identify within this context those facets of *transnationalism* that would 'equally' concern political scientists and legal scholars, especially those working on subjects related to the EU governance. Yet, we intend to do so with the expectation to put forward an overall argument.

It is common knowledge that the political and legal development within the EU is historically unprecedented and geographically unique. Considering prior and ongoing internal crises, openly represented by the Brexit, the level of coordination and convergence in political and legal matters, including but not limited to the security-related ones, within the Union is not to be taken for granted. There is no denying that while in certain security domains (for instance, the stand on the Russo-Ukrainian armed conflict) there is a strong focus on the EU voice, in others cooperation among the EU MSs remains not only difficult but their political positions

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within the Union makes convergence an ongoing struggle (for instance, the handling of the refugee crisis). In this sense, we argue, it is important to remind ourselves that the EU was, and still is, the outcome of a political decision, wanted and supported by its MSs and as such, it is sensitive to EU MSs' priorities and particularities. The EU is still far from being a sovereign actor able to make independent and authoritative decisions especially for what concerns the security realm, the quintessential realm of national sovereignty. Hence, in order to have a more concrete debate on the status of security in EU and come up with a constructive criticism aiming to strengthen the EU construction, we examine critically the EU responses to *transnational* challenges without losing sight of the broader political framework made of push and pull dynamics of cooperation.

The notion of transnationalism is chosen to link the contributions to this edited book with each other – in the light of recent and ongoing developments shaping the current political and security momentum. Indeed, the historical time during which this book is published is *per se* permeated of complex challenges that Europe is, to different extents, pushed and expected to face. As of 2023, Europe is witnessing an aggressive war at its borders between the Russian Federation and Ukraine. This is a war where the question of being 'European' is one of the crucial elements of contestation, as well as a war that is concretely impacting the EU security narratives and responses currently focused on energy provision and security. Before that, and in 2020 and 2021, the EU witnessed, among other things: the devastating spread of the COVID-19 pandemic, which was coupled with the suspension of many fundamental rights for European citizens and residents and a potentially detrimental impact for rule of law and democracy (cf. Grogan 2021; Council of Europe 2020); new practices of restriction and push-backs of migrants strengthening tensions between EU MSs and third countries such as in the Western Balkans or between the Turkish and the Greek borders; and new terrorist attacks in France and Austria at the end of 2020. During 2020 we also witnessed the appointment of the new European Commission (EC) led by Ursula von der Leyen, the release of the new EU Security Union Agenda (EC 2020a) prioritising, *inter alia*, the combat against terrorism and organised crime, as well as the publication of the new Counter-Terrorism Agenda 15 years after the first EU Counterterrorism Strategy (EC 2020b). Besides this, the EU declared itself fit for the digital age – with the EC proposing on 15 December 2020 a comprehensive set of new rules for all digital services to be incorporated into the so-called Digital Services Act and Digital Markets Act (EC 2020c), which, in the meantime, have been adopted and will soon become applicable law. In parallel, the intention to regulate new and emerging technologies at EU level has also been reflected in the EC (2021) Proposal for a Regulation laying down harmonised rules on artificial intelligence (known as the EU AI Act (AIA)). The AIA addresses, *inter alia*, the use of AI systems in law enforcement settings – classifying the latter as high-risk systems (Art. 6, Annex III). To date, the complexity of the subject matter as well as significant overlaps between the EU AIA and other sector-specific laws have significantly slowed down the progress of the trilogue negotiations.

Against this background, and if the old saying about the EU being created by crises is true, this is a good moment to reflect upon successes and shortcomings in the current European transnational project. To do so, this book gathers contributions by legal and political scientists aiming to provide a state-of-the-art account of responses to security-related challenges and their meaning and impact for the EU in terms of a pre-eminent example of a transnational political and legal order.

In the following, we discuss the current state-of-the-art and the contributions that this book expects to bring in relation to the current discussion on European transnationalism.

Law and politics of transnational challenges: intersections, missing pieces and the book contributions

Without aspiring to provide a comprehensive overview of all possible meanings ascribed to transnationalism, it is worth highlighting the different ways in which transnationalism appeared in the research agenda of social sciences (De Jong and Dannecker 2018). Transnationalism was first used to depict the 'global reorganization of the production process' in terms of a 'structural-economic transformation beyond and outside human practices and agencies' (ibid., 493–494). The focus was shifted onto individuals as central actors and change drivers (e.g., Portes et al. 1999, 220), only when Basch, Glick-Schiller and Blanc-Szanton (1994, 1) used that term to refer to the 'processes by which immigrants build social fields that link together their country of origin and their country of residence' (cited by De Jong and Dannecker 2018, 494). From that point, which marks the importance of 'the spatial and cultural interconnectedness of people, cultural forms and objects as well as economic processes' (idem), onwards, new ideas have been developed around the concept of transnationalism by scholars working beyond and outside migration studies. That has already led some others to express the concern that transnationalism might become a 'catch-all and say nothing' term (Pries 2008, 3), while others to point out that the plethora of studies has not been translated into theoretical innovation and conceptual development (De Jong and Dannecker 2018, 494). That criticism – encompassing, *inter alia*, the lack of studies on cross-border formations emerging through social and political practices (cf. Pries 2008, 44) – serves as a starting point for this volume, which seeks to revisit the notion of transnationalism through the twofold lens of political and legal science. To this end, the broad definition of transnationalism as 'multiple ties and interactions linking people, organisations or institutions across the borders of nation-states' (Vertovec 1999, 47; Pries 2007, 16 cited by De Jong and Dannecker 2018, 496) will be used as a platform, in order to arrive at tangible results as regards the political and legal governance of security threats and challenges at EU level.

In this context, this edited book equally takes into consideration the transnational turn in law – often called 'legal transnationalism' and perceived as a 'multifaceted phenomenon' (Kersch 2005, 363). That entails, for instance, the establishment of universal jurisdiction, the empowerment of transnational and supranational courts, the more powerful consideration of treaty obligations in the national jurisprudence as well as the fidelity shown to the law of nations, including customary international law (idem). Cotterrell (2009, 481–482) systematises the phenomena pertaining to legal transnationalism in two categories: (1) laws and regulations that reach across nation-state borders (and often bypass state authorities or use them 'as conduits for regulation created and interpreted primarily by agencies' and not state authorities); (2) nation-state regulatory policies and practices influenced by economic, cultural and political pressures that are being shaped outside the nation-state borders and, as such, are beyond the nation-state control. In this context and despite the convergence-thinking-related criticism, the EU can be seen as a 'superb laboratory' to study transnational regulation as well as the 'sociological character of [Europe] that constitutes [its] social setting' (ibid., 492). More recent studies on EU law also underline the perception of the EU as 'the leading exemplar of a transnational legal order' and seek to address on this basis, among other things, the question of whether the EU has done enough to advance the protection of fundamental rights or –more generally– to 'exhibit

the values it claims to uphold, while meeting the challenges posed by, for instance, terrorism and the counterterrorism imperative (Murphy 2019).

Indeed, transnationalism and cross-border cooperation in particular have been valued as defining features of the EU project for decades (see Kaiser et al. 2009; DeBardeleben and Hurrelmann 2011; Börner and Eigmüller 2015). The literature has been particularly attentive in emphasising different dynamics of transnationalism as key aspects of the European common market in function of trade, production and even financial interests and regulation (Sadurski et al. 2006; Patel and Schweitzer 2013; Bieling et al. 2016). Forms of transnational cooperation and convergence have also been increasingly important in developing converging jurisprudential and security practices (Bureš 2016; Den Boer and Wiegand 2015). Yet, despite a renovated interest in the destiny of the EU (see Matthijs 2020), there is still the need to analyse the status and explore the functionality of the EU-centred transnationalism in the light of emerging challenges. In that sense, the momentum, during which this book is published represents a perfect starting point, as explained above, for a sort of executive summary of various security issues that arose at multiple levels, and considerably challenged existing legal and political apparatuses.

Filling the gap: a more integrated discussion on transnationalism?

In light of new or changing security challenges, we believe that there is a renovated need to discuss transnationalism and its challenges by focusing on new parameters or elaborate on less highlighted ones. This edited book is structured to offer theoretical and empirical insights on the sociopolitical and legal governance of transnational threats emerging from the 'high intensity of exchanges, the new modes of transacting, and the multiplication of activities [requiring] cross-border travel and contacts on a sustained basis' (Portes et al. 1999, 219) that shape once again and more increasingly than ever the EU space.

Indeed, much of the existing scholarship on cooperation in the field of security has underlined how vertical and horizontal institutional consistency (Nuttall 2005; Argomaniz 2011) is slowly making Europe a more consistent polity in its legal and policy design. Degrees of horizontal consistency – defined across three dimensions, namely legal instruments and practices, obligations and organisational arrangements (Nuttall 2005) – have been employed to evaluate the extent to which the institutionalisation of security efforts, such as counterterrorism measures, has generated coherent modes of governance. Yet, we argue, there are two marginally addressed issues, which characterise leading accounts of the topic and represent the research objectives that the editors and the authors of this book seek to achieve.

First, in academic terms, a considerable cleavage exists among different disciplines interested in the European transnationalism (irrespective of the definition one adopts or the aspects of transnationalism one chooses to focus on), and particularly between the legal and the political scholarly communities (see Whittington et al. 2011). In fact, despite few exceptions of works balancing jurisprudential with political dynamics (e.g., Kaunert and Léonard 2012; Argomaniz et al. 2017; Eckes 2019), much of the current academic production is sectarianised between (European) Law and (European) Politics. Hence, the first objective of this volume is to respond to the need of a renewed multi-disciplinarity and to use the case of EU responses to transnational security threats to signal the need for legal and political scientists to work together and strengthen the respective scholarly discourse.

Second, it is worth highlighting the relative scarcity of studies concerning how perceptions, practices and policies have changed in reaction to the recent exposure of EU to the series of the aforementioned transnational challenges. In that sense, we argue that recent events within the EU borders and transformations taking place beyond those, such as the digital one, are putting the EU project (again) under pressure, leading, in many cases, to open yet still underexplored challenges to the existing *acquis* (cf. McNamara 2018). Hence, the second objective of this edited book is to explore current transnational threats across Europe in view of elaborating considerations on the implications for the EU apparatus – with a focus on the efforts of the EU policymakers and legislator to address those threats. In this context, recent EU measures on contrasting irregular migration, combating terrorism or designing a functional sanction system for human rights violations, as well as the interest in employing new technologies for law enforcement and criminal justice purposes, or even the EU reaction to economic crisis (given its indirect impact on the way EU MSs responded to, *inter alia*, security threats) represent critical cases to comprehend and to evaluate the (ever-)changing landscape of European politics and law. Through a timely analysis of the specificities of these use cases, the book chapters presented below contribute to a much wider debate on whether and to what extent the changes and practices identified are still in accordance with fundamental freedoms, democracy and the rule of law as cornerstones of the EU governance project.

In other words, this book offers a ‘Law & Politics’ approach to the notions ‘transnationalism’ and ‘security’ as well as to the institutional reaction to security threats and its implications. In doing so, differences in academic discourse, methods and focus cannot, nor should, be avoided or demonised as they allow specialisation and intradisciplinary (coherent) development. Nonetheless, there is a point to be made about the utility of rediscovering and reinforcing interdisciplinarity in this peculiar historical moment shaped, as already mentioned, by new terrorist attacks and threats (cf. Europol 2020a), new forms of violence related to irregular migration, the Internet organised crime threat (cf. Europol 2020b, 2021) up until the recent COVID-19 crisis across the world. Such security challenges, we argue, reinforce the need for a reflection beyond the ‘comfort zone’ of a single discipline – and that need equally extends to the public debate, in the context of which rethinking the relationship between law and politics is much desired.

Threats, strategies and actors of European transnationalism: The book in brief

This volume is inspired by and designed upon an exchange of ideas that first took place as part of the Max Weber Multidisciplinary Research Workshop ‘European Transnationalism Between Successes and Shortcomings: Threats, Strategies and Actors under the Microscope’, held at the European University Institute on 19 May 2019. The latter has also served as the basis for the titular SI published in the *Journal of Contemporary European Studies*. That SI brought together – the same way that this book does – experts of European politics and law, in order to offer a cross-disciplinary account of current cross-border security threats in reference to both the inter-EU and the intra-EU level and the responses to those within a peculiar political space characterised by intense levels of cooperation, integration and more recently digitalisation such as the EU.

Specifically, the contributions to this book are designed on a three-axe basis: (1) security risks and threats, whether direct or indirect, at inter- and intra-EU level; (2) EU institutional reaction entailing both political and legal responses to the aforementioned risks and threats; and (3) consequences and implications, particularly for democracy, rule of law and fundamental

rights. Aiming to reinforce the connection between the political and the legal approach, the sequence of publication is not discipline-oriented but rather (commonly identified) challenges-oriented.

In their chapter 'Bordering power Europe? The mobility-bordering nexus in and by the European Union', Giorgio Grappi and Sonia Lucarelli start their analysis by noting a transition from the idea that enhanced transnational state relations positively affect international cooperation and security (in terms of a fundamental idea for the EU project) to a process, marking the past decade, of hardening of internal and external EU borders as a result of (fear of) cross-border terrorism, irregular migration and, more recently, spread of highly contagious viruses. While closely observing that transition, they explain how 'harder' and 'softer' borders coexist for the function they perform as well as how new functional borders emerge from different forms of re- and trans-bordering processes. Following the border transformation paradigm, they subsequently deal with border externalisation, internal bordering and logistification – classifying those phenomena as border redefinition's dynamics that can impact on national sovereignty, territoriality and rights. In this context, they also examine the function of COVID-19 crisis as a catalyst for EU towards enhancing bordering practices. Upon the ground of that multiple-level analysis, they conclude that such practices inevitably impact on the originally integration-oriented EU polity.

Richard McNeil-Willson shifts subsequently the focus onto EU counterterrorism measures. In the chapter entitled 'Counter-terrorism and the repression of Islamic activism: Hizb ut-Tahrir in Britain and Denmark', he examines empirically how two branches of the same Islamic activist organisation, namely the British and the Scandinavian branch of Hizb ut-Tahrir, have experienced counterterrorism – following Boykoff's (2007, 283) typology of repression, that is, a distinction between four dynamic mechanisms: resource depletion; stigmatisation; divisive disruption; and intimidation. On the basis of that empirical research conducted with interviews, McNeil-Willson concludes that those measures do not only present a cross-border nature, which is inherent in their design (if one looks at the EU paradigm), but also have an impact beyond persons directly targeted by counterterrorism. That effect appears to be implicated within the seemingly widening 'securitised lens' in Europe.

Alessandra Russo and Ervjola Selenica may retain the focus on terrorism, but actually explore a peculiar and largely under-addressed matter related to it: the process of knowledge production on 'radicalisation'. Specifically, in the chapter entitled 'Actors and sites for knowledge production on radicalisation in Europe and beyond', they offer an important and timely contribution in relation to the way the EU has managed and built its approach to countering violent extremism. More in detail, they focus on expert and scientific knowledge as sources of leverage and contention in security-related policy areas and demonstrate how project consortia serve a function of legitimisation and validation of evidence for the radicalisation discourse and terms of reference established by the Commission.

In the chapter 'EU global human rights sanctions regime: is the genie out of the bottle?', Christina Eckes makes of human rights violations or abuses, defined for the purposes of the Human Rights Sanctions Regime (EU HRSR) with the help of customary international law and widely accepted instruments of international law, the focal point of her analysis. The personal scope of the respective sanctions is presented to underline the progressive inclusion not only of those being directly responsible for the aforementioned violations (first level), but also (at the third level) those who might simply be associated with the first ones or even with those, for

instance, encouraging those acts (second level). That regime can be perceived as a pertinent example of the emerging centralisation of cooperation in the area of sanctions, when one looks at its adoption, the so-called listing procedure as well as the supranational oversight. Attempting to assess the outcome of that greater centralisation in the realm of transnational sanctions in a balanced way, the author critically examines potential advantages such as enhanced flexibility and greater speed or the achievement of the 'bigger' global justice goal, before, finally, shedding light to potential legitimacy pitfalls associated with, *inter alia*, the protection of fundamental rights, the evidentiary threshold and the burden of proof as well as the reliance on open source materials.

The following chapter 'Europol and cybercrime: Europol's sharing decryption platform' by Ethem Ilbiz and Christian Kaunert returns to the EU counterterrorism model to look closer at its cyberspace dimension, and more specifically at Europol's sharing decryption platform, established to technically assist national law enforcement agencies in tackling encryption problems in criminal investigations. In doing so, they underline the increasing role of EU agencies in internal security with a focus on cyber security, while identifying a strong potential inherent in the aforementioned platform to reduce transaction costs of outsourcers and diminish trust-related problems by replacing the private actors. After having assessed the *status quo*, they propose, however, an enhanced sharing economy model for a more efficient platform, in the context of which chain-of-custody monitoring mechanisms shall ensure the inclusion of private actors on the basis of a robust vetting mechanism and evidence security.

From a legal perspective, in the chapter 'OK Google: is (s)he guilty?' Athina Sachoulidou revisits the dilemma between enhanced operational efficiency and protection of fundamental rights – goals that should ideally be equally achieved – while exploring the use of big-data-driven tools and technologies in the realm of law enforcement and criminal justice. After examining use cases pertaining to big-data-supported automation in those areas, she provides a balanced approach to efficiency and even fairness-related expectations and potential risks, ranging from biased judgement to transparency-related challenges. After this, she limits the scope of her analysis by focusing on the presumption of innocence (PoI) as enshrined in the European Convention on Human Rights and the EU Charter of Fundamental Rights. In this context, she examines two scenarios, that of 'being a suspect or defendant' and that of 'being "merely" a person of interest' in the big data era, by using the EU data protection legislation and the so-called 'E-evidence Proposal' as points of reference. The analysis leads to a twofold conclusion: the need to adopt further procedural safeguards to address the indirect reversal of proof as a result of relying on big data sources in the realm of criminal justice, and the need for a wider understanding of PoI beyond its procedural framework to include the so-called pre-suspects that are currently captured by big-data-driven mass surveillance while falling outside the protective scope of the right to be presumed innocent.

With the chapter entitled 'The perceived rationale, variegated institutional take and impact of the EU's human rights policy in Armenia and Georgia' by Tatevik Badalyan and Syuzanna Vasilyan, the volume addresses again the question of human rights and the specific role of the EU in effectively promoting them in neighbouring countries. Differently from the contribution of Christina Eckes, however, the authors depart from the debate on democracy promotion mostly originating in the field of International Relations and EU studies. This chapter specifically analyses the process of democratic consolidation in Armenia and Georgia and accounts for the process ending up in favour of accession into the Customs Union/Eurasian Economic

Union of both countries. We find this contribution particularly relevant to shed light on the foreign politics of human rights and the potential backlashes this process might generate in the EU environment.

Finally, this book also includes a specific case study concerning an issue that, despite not being a security topic, is worth considering when it comes to the way EU builds its legitimacy and responds to cross-border issues such as the sovereign debt crisis – considering the impact of the latter on how security matters have been addressed at both national and EU level. Through an agenda setting analysis framework, David Moloney assesses the EC and European Council's influence in reforming the EU economic governance framework. Specifically, this chapter shows that between 2010 and 2013 the European Council wielded policy influence exactly through its agenda-setting powers. Conversely, the EC exercised less influence in those negotiations, despite its position as the EU's *de facto* agenda-setter.

As a conclusive note, we aspire that the links identified between these contributions will give not only new impulse to transnationalism studies at the crossroads of legal and political science, but also make this book something more than a sum of its parts in terms of a comprehensive analysis of cross-border responses to equally cross-border security threats and their limits within the transnational EU environment.

Disclosure statement

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