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European transnationalism between successes and shortcomings: threats, strategies and actors under the microscope

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ABSTRACT

This article introduces the Special Issue 'European transnationalism between successes and shortcomings: Threats, strategies and actors under the microscope'. Specifically, it focuses on transnationalism in terms of a key concept to be deployed while seeking to decode and evaluate EU political and legal governance-related choices, and particularly those made to address cross-border security threats. In doing so, it first explains the choice of 'transnationalism' as focal point while referring to the current momentum, namely legal and political developments that have recently taken place or are currently under consideration. In this context, it looks both at current and diachronic transnational challenges, such as terrorism and irregular migration. Second, it explores the links between law and politics with respect to security and transnationalism, in order to present the background of this Special Issue as well as its added value. Third, it provides an overview of the studies included in the latter and explains how those are connected to each other, while seeking to identify which threats, strategies and actors shall be put under the microscope.

KEYWORDS

European transnationalism; counter-terrorism; radicalisation; EU Human Rights Sanctions Regime; borders; migration; EU Agencies; Europol; cyberspace; law enforcement; big data; fundamental rights

Introduction: why transnationalism (now)?

This Special Issue (SI) of the *Journal of Contemporary European Studies* 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 has some important policy implications. We specifically focus on the case of transnationalism in the European Union (EU) as while the Member States 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?

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Overall, the Special Issue shows, the current status of security and the way it is understood and practiced do deserves a multidisciplinary discussion on how Europe experiences, perceives and responds to security challenges. The expectation is to identify within this context those facets of *transnationalism* that would 'equally' concern political scientists and legal scholars, especially those working on subjects pertaining to the EU governance.

Transnationalism is also chosen to serve as a link between the articles of this SI in the light of recent and ongoing developments shaping the current political and security momentum. Indeed, in 2020 only, 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 Member States and third countries such as in the Western Balkans or between the Turkish and Greek border; and new terrorist attacks in France and Austria at the end of the year. 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) prioritizing, *inter alia*, the combat against terrorism and organised crime, as well as the publication of the new Counterterrorism Agenda 15 years after the first EU Counterterrorism Strategy (EC 2020b). Besides this, 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). In parallel, more delicate issues, such as the use of artificial intelligence by the police and judicial authorities in criminal matters, have also entered the EU agenda (LIBE Committee 2020) – with the EC (2021) proposing a Regulation laying down harmonised rules on artificial intelligence (including its potential use in the realm of law enforcement) on 21 April 2021.

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 SI 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 existing state-of-the-art and the contributions that this SI expects to bring in relation to the current discussion on European transnationalism.

Law and politics: intersections, missing pieces and special issue contributions

Transnationalism: the crossroads of legal and political studies

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 to individuals as central actors and change drivers (e.g. Portes, Guarnizo, and Landolt 1999, 220), only when Basch, Schiller, and Blanc (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 SI, 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’ (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, the SI equally takes into consideration the transnational turn in law – often called ‘legal transnationalism’ and perceived as a ‘multifaceted phenomenon’ (Ken 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) systematizes 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, 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 counter-terrorism imperative (Murphy 2019, 219; 228; 242).

Indeed, transnationalism and cross-border cooperation in particular have been valued as defining features of the European project for decades (see Kaiser, Leucht, and Rasmussen 2009; DeBardeleben and Hurrelmann 2011; Börner and Eigmüller 2015). The literature has been particularly attentive in emphasising different dynamics of transnationalism as key aspect of the European common market in function of trade, production and even financial interests and regulation (Sadurski, Czarnota, and Krygier 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 need to analyse the status and explore the functionality of the EU-centred transnationalism in the light of emerging challenges. In that sense, 2020, during which this SI was conceived, represents may be a perfect starting point, as it presented, as explained above, 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 SI is designed to offer theoretical and empirical insights on the socio-political 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, Guarnizo, and Landolt 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 of 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 institutionalisation of security efforts, such as counter-terrorism measures, has generated coherent modes of governance. Yet, we argue that 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 SI 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 science scholar communities (see Whittington, Kelemen, and Caldeira 2011). In fact, despite few exceptions of works balancing jurisprudential with political dynamics (e.g. Kaunert and Léonard 2012; Argomaniz, Bures, and Kaunert 2017; Eckes 2019), much of the current academic production are sectarianized between (European) Law and (European) Politics. Hence, the first objective of this SI is to respond to the need of a renewed multi-disciplinarity and to use the case of EU responses to transnational 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 European 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 SI is to explore the current transnational threats across Europe in view of elaborating considerations on the implications for the European apparatus – with a focus on the efforts of the EU policy-makers and legislator to address those threats. In this context, recent European 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, 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 articles entailed in this SI 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 SI 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 intra-disciplinary (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) 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.

To conclude, we believe, there are three specific advantages of increasing the cooperation between law and political science in matters related to transnationalism.

First, this cooperation may remind the scholarly community of the original function and added value of law and politics that are often taken for granted, particularly in times of crisis. Law and politics have both functioned as organisation and ordering principles since the earliest forms of societal developments. In many instances, they both allowed the institutionalisation of differences in powers and roles. They both eventually developed to bring about justice, respond to societal needs and reduce inconsistencies and unfair conditions. In democratic and liberal societies, they eventually

found a balance in order to work as ‘separate and connected’ (Cerar 2009, 3). Law would be the recipient or the means of politics that instead functions as a driving force but that, on its end, cannot exist without regulation. Law forces politics to remain and respect certain limits enshrined whether in national constitutions or in supranational charters. Politics offers the content and the pressure to respond to necessities and interests that law expresses in normative manners – with the latter considerably varying among the different fields and levels of legal regulation. But, again, democratic societies and liberal political projects such as the EU are grounded and contracted to maintain a clear equal relationship between the two.

The second advantage of reinforcing the dialogue between law and political science concerns the reinvention of the law and society perspective. This entails a better perception of the struggle of interests and perspectives, i.e. the politics, behind law. This requires re-exploring not only how law is mobilized at first place but also how it is experienced at second place (Whittington, Kelemen, and Caldeira 2011). In this context, it remains of critical importance to better consider the field-related specificities of state regulatory interventions, such as those taking place in the field of criminal law and neighbouring areas of regulation being associated with a detrimental impact on fundamental liberties and, potentially, social cohesion. But also, this SI does emphasise the importance of taking into due consideration the ideational context within which legal and political actors operate and what kind of instruments they employ, in order to advance their perceived interest and perspective.

Threats, strategies and actors of European transnationalism: the special issue overview

This SI is inspired by and designed upon an exchange of ideas that first took place in the context 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. That workshop brought together – the same way that this SI does – experts of European politics and law, in order to offer a cross-disciplinary account of current cross-border 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 SI are designed on a three-axes basis: 1) security risks and threats 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 article ‘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 borders transformation paradigm, they subsequently deal with borders externalization, internal bordering and logistification – classifying those phenomena as borders redefinition’s dynamics that can impact on national sovereignty, territoriality and rights. In that 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 on EU counter-terrorism measures. In his article 'Counter-terrorism and the Repression of Islamic Activism: Hizb ut-Tahrir in Western Europe', he empirically examines how two branches of the same Islamic activist organisation, namely the British and the Scandinavian branch of Hizb ut-Tahrir, have experienced counter-terrorism – following Boykoff's (2007: 283) typology of repression, i.e. a distinction between four dynamic mechanisms: resource depletion; stigmatisation; divisive disruption and intimidation. On the basis of that empirical research conducted with interviews, he 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 those directly targeted by counter-terrorism. 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 their article '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 (CVE). More in detail, they focus on experts' 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 article 'EU Global Human Rights Sanctions Regime [EU HRSR]: Is the Genie out of the Bottle?', Christina Eckes makes of human rights violations or abuses, defined for the purposes of the 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 centralization 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 centralization 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.

In their article 'Europol, Cyberspace and Counter-terrorism: Europol's Sharing Decryption Platform', Ethem Ilbiz and Christian Kaunert return to the EU counter-terrorism 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. On the basis of that example, 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 outsources 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 robust vetting mechanism and evidence security.

Finally, Athina Sachoulidou revisits in the article 'OK Google: Is (s)he guilty?' 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 in the realm of law enforcement and criminal justice. After examining use cases pertaining to big-data-supported automation in those fields, she provides a balanced approach to efficiency and even fairness-related expectations and potential risks, ranging from biased judgment 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 Right 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 law, 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.

Concluding, we hope that the links identified between those contributions will not only give new impulse to transnationalism studies at the crossroads of legal and political science but also make this SI 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.

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