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The Jurisprudence of Process and European Transnational Private Law

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'In the world where the United States projects hard power through its military and engagement in trade wars, and China economic power through its loans and investments, the EU exerts power through the most potent tool for global influence it has – regulation.'[1]

'Not every question of group concern can be decided by officials, and certainly not every such question in the first instance. Every society necessarily assigns many kinds of questions to private decision, and then backs up the private decision, if it has been duly made, when and if it is challenged before officials. … In a genuine sense, these procedures of private decision, too, become institutionalized. An understanding of how they work is vital to an understanding of the institutional system as a whole'.[2]

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[1] A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford, Oxford University Press, 2020) 24.

[2] HM Hart and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* [1958] (Washington, Foundation Press, 1994) 7.

I. EXCAVATING FOUNDATIONS: PROCESS AND PROCEDURALISATION IN THE EXTERNAL DIMENSION OF EU LAW

EU LAW HAS nowadays achieved a noticeable external dimension. Since the publication of seminal studies by Anu Bradford and Joanne Scott in the early 2010s,[3] this phenomenon has been extensively documented by a wide-ranging set of scholarly work in different areas of EU law.[4] This interest has been paralleled by salient reports from influential media and non-governmental organisations (NGOs), which signals a growing drive within public opinion to grasp and scrutinise the ventures of EU law beyond EU frontiers.[5] This drive is especially welcome at a time when the EU has most forcefully entered the complex geopolitical power play by seeking to 'promote European interests and values on the global stage' through building 'a stronger Europe in the world' and fostering 'our European way of life' as one of its 'strategic priorities'.[6] Despite their polemic overtones, these are the ambitions that are now officially guiding the political actions and regulatory programmes of EU institutions within and beyond the internal market in several socio-economic realms.[7] The EU is thus currently experiencing a salient 'geopolitical awakening'.[8]

[3] See mainly A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1; J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *The American Journal of Comparative Law* 87; and J Scott, 'The New EU Extraterritoriality' (2014) 51 *CML Rev* 1343.

[4] See, eg, and with further references, E Fahey, *The Global Reach of EU Law* (Oxfordshire, Taylor & Francis, 2016); L Ankersmit, *Free Trade, Fair Trade, and Green Trade in and with the EU: Process-based Measures within the EU Legal Order* (Cambridge, Cambridge University Press, 2017); M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford, Oxford University Press, 2019); HCH Hofmann, E Vos and M Chamon (eds), *The External Dimension of EU Agencies and Bodies: Law and Policy* (Cheltenham, Edward Elgar Publishing, 2019); I Hadjiyianni, *The EU As a Global Regulator for Environmental Protection: A Legitimacy Perspective* (London, Bloomsbury Publishing Plc, 2019); T Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Berlin, Springer Nature, 2020); N Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU* (Berlin, Springer Nature, 2021); MC Eritja (ed), *The European Union and Global Environmental Protection: Transforming Influence into Action* (Oxfordshire, Routledge, 2020); and E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Cheltenham, Edward Elgar Publishing, 2022).

[5] See, eg, 'EU Deforestation Law Triggers Ire of its Trading Partners' *Financial Times* (6 February 2023), available at www.ft.com/content/c2f2eea9-1eb5-478f-ac53-5666776c0a35, noting how 'the law is particularly galling for the two South-East Asian Countries' whose agricultural economies are significantly dependent upon the production of palm-oil that is directly targeted by the legislation and how 'Brazil, Argentina, Ghana, Nigeria, and Canada – all exporters of Agricultural commodities – also regard Brussels's move as a protectionist measure.' See also, more generally, 'Whose Paying the Bill?: (Negative) Impacts of EU Policies and Practices in the World' (*SDG Watch Europe*, 2019), available at https://sdgwatcheurope.org/who-is-paying-the-bill/, documenting inconsistencies between the EU's embrace of the Sustainable Development Goals and the foreign effects of its policies in several socio-economic realms, such as fisheries, land-use, finance, and chemicals.

[6] See European Union, 'European Union Priorities 2019–2024', available at https://european-union.europa.eu/priorities-and-actions/european-union-priorities-2019-2024_en.

[7] See, European Commission, 'A Stronger Europe in the World', available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world_en; and European Commission, 'Promoting our European Way of Life', available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life_en signalling several socio-economic realms as the focus of these political priorities and concurrent policy programmes, including health, migration, security, and trade.

[8] L van Middelaar, 'Europe's Geopolitical Awakening' (2021) 8 *Groupe d'études géopolitiques*, available at https://geopolitique.eu/en/2021/04/15/europes-geopolitical-awakening/.

While the existing literature regarding the external dimension of EU law is by now diverse in its substantive focus and geographical reach, the several contributions to this volume represent a valuable addition to this overarching scholarly effort. There are several reasons for this. Some of these contributions are novel in terms of the entities or sectors that are studied, such as European Works Councils (Liukkunen, chapter 6), taxation (Pantazatou, chapter 12), and regulated industries (Micklitz, chapter 3). Others are novel due to the theoretical and methodological approaches used, such as chapter 9 from Chadwick that uses political economy as a framework to critically review the place and role of EU law within contemporary developments in transnational finance, or chapter 14 by Salminen, Rajavuori, and Eller that shows how the EU is drawing upon global value chains to export its internal market discipline through a reconstructive account of recent EU legislative and regulatory developments in the field. The study developed by Letto-Vanamo in chapter 5 on how European law travels through epistemic communities adds new layers to these two planes of novelty by expounding on the historical and sociological dimensions of the phenomenon.

Finally, other chapters stand out due to their provocative outlook. One example is chapter 7 from Möschel that shows the limited external effect of EU non-discrimination law and discusses some of the possible explanations. This is also the case of chapter 11 from Mataija that shows how the EU is leveraging international trade law to discipline foreign production and commercialisation processes. A final example is chapter 13 from Ulfbeck that discusses how European tort law doctrines are evolving to foster regulatory change towards climate neutrality in foreign market relations. Each of the case studies in this volume can thus be read as enhancing this overall scholarly endeavour regarding the foreign sway of EU law by either exploring new terrain and approaches or by adding relevant nuances to existing sectoral accounts.

Any research project of this diversity and ambition faces a crucial challenge. The risk is that the book becomes a mere *collage* of varied and interesting journeys into different domains of EU law beyond the frontiers of the internal market. This would transform the book into a sort of travel guide for whoever would like to further embark on and deepen each of these foreign adventures of EU law. The challenge is thus to bring this range of exciting journeys into a common vocabulary to make them amenable for comparison, and thus reciprocal enrichment. In other words, we need a conceptual framework.

Two provisos are in order here. The first is that, to prevent the malaises of so-called *Begriffsjurisprudenz*, this conceptual framework should be sufficiently open and nuanced to encompass what is happening in practice throughout a wide range of EU legal-policy fields beyond the internal market. This includes tracing the different modalities through which EU private law is travelling abroad, the role of law in shaping those modalities, as well as its material and cultural consequences. I call this the anti-mystification proviso. The second proviso is the Janus-face of the previous one: concepts in law and legal studies are not mere labels that aim to describe something that exists independent of their descriptions. Unless merely nominal, legal concepts partially produce the reality that they aim to describe by institutionalising a set of socio-political practices according to certain immanent aims or dispositions that are

meant to purposively guide those practices. I call this the performative dimension of legal concepts.

While avoiding mystification, any productive mode of legal conceptualisation inevitably involves a performative dimension. To say it *à la* Habermas, in other words, legal concepts and institutions usually place themselves in 'between facts and norms'.[9] Eighty years before Habermas, this insight was perhaps best articulated by Felix Frankfurter, when addressing a similarly challenging scenario of how to make sense in legal terms of widespread regulatory practices:

> … the way in which law reflects social forces partly helps to shape them. This is where scholarship comes in, or whatever one may call the systematic process of rational inquiry. … mere empiric unfolding, piling precedent upon precedent, is bound eventually to beget a bewildering and unpersuasive mass of unrelated instances. A philosophy is needed. But if particulars without a binding philosophy are the easy prey of distortion or misunderstanding, abstract generalities are like paper flowers, pretty but lifeless.[10]

In this vein, our choice of how to conceptualise the phenomenon of EU law beyond EU frontiers has not been random. As explained in our introductory chapter of this volume, the notion of transnational law renders itself useful to identify, understand, and assess the place and role of EU private law throughout a vast array of legal regimes or policy domains beyond the frontiers of the internal market. This is mainly due to its capacity to pluralistically trace the diverse actors, norms, and processes involved in those regimes and to bridge established distinctions between the private/public, national/international, or law/non-law. With its pluralistic framework, transnational law thus offers a distinctive analytical ductility that has been mainly attributed to its methodological nature, rather than conceiving it as some kind of theory or substantive field.[11]

Yet what are the assumptions and normative dispositions regarding socio-political power and legal authority underlying this method? Why are we to engage with this phenomenon by tracing actors, norms, and processes but not in some other ways? How can we assess the suitability and desirability of these transnational interactions informing the intrepid voyages of EU private law beyond the frontiers of the internal market? In other words, what justifies this methodological approach? These are all foundational questions that cannot be avoided under the veneer of simply following some kind of method – regardless of how scientific, descriptive, or objective it purports to be.[12] In line with the foundational ambitions of the book, and as a complement to the chapters from the other co-editors in the volume, the object of

[9] J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* [1992] (Cambridge, The MIT Press, 1996).

[10] F Frankfurter, 'The Final Report of the Attorney General's Committee on Administrative Procedure. Foreword' (1941) 41 *Columbia Law Review* 585, 586.

[11] For a discussion, see P Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 *Transnational Law & Contemporary Problems* 305.

[12] M Bartl and JC Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Cheltenham, Edward Elgar Publishing, 2022). See also, PW Kahn, 'Freedom and Method' in R van Gestel, HW Micklitz, EL Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge, Cambridge University Press, 2017).

this chapter is thus to 'excavate foundations' for this research agenda on European transnational private law by focusing on its jurisprudential or legal theory facets.[13]

The working hypothesis guiding the chapter is that the emphasis on 'process' that has been informing this method has significant potential to illuminate these foundational questions. The emphasis on 'process' or 'proceduralisation' is nowadays ubiquitous in contemporary legal theory and practice. Much of contemporary lawyering and legal studies are indeed driven analytically and normatively by the need to enhance the procedural qualities of rulemaking and their operationalisation within national or transnational policies.[14] For the purposes of this volume, most importantly, these studies include some of the most salient scholarly analysis of the external dimension of EU law[15] as well as its relevant practices.[16] To the extent that these external effects of the EU, and its overall 'geo-political awakening', have been given the significance of potentially renovating or invigorating the EU's own *raison d'être*, process and proceduralisation have thus become integral to this pathway for reinvigoration.[17]

[13] M Loughlin, 'Excavating Foundations' in MA Wilkinson, MW Dowdle (eds), *Questioning the Foundations of Public Law* (London, Bloomsbury Publishing, 2018): noting how 'the common challenge' in the search for foundations of legal institutions 'is to devise a conceptual scheme through which the constitution of political authority can be explained'. Throughout this chapter, I use the terms 'legal theory', 'philosophy of law', and 'jurisprudence' as synonyms and thus interchangeably.

[14] See, eg, F Bignami and D Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Cheltenham, Edward Elgar Publishing, 2016); TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge, Cambridge University Press, 2015); and J Waldron, 'The Rule of Law and the Importance of Procedure' in JE Fleming (ed), *Nomos: Getting to the Rule of Law* (New York, NYU Press, 2011). See also, in general, R Weithölter, 'Proceduralization of the Category of Law' (2011) 12 *German Law Journal* 465.

[15] M Cremona and J Scott, 'Introduction – EU Law Beyond EU Borders' in M Cremona, J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford, Oxford University Press, 2019) 20: concluding that '… it is the present authors' contention that the Commission ought to be required to pay close attention to the possible impacts of EU measures on third countries, and to develop a transparent framework for assessing trade-offs between competing interests in third countries, and between interests inside and outside the EU'. In the same vein, see also Bradford (n 1) 262–63: outlining the type of economic, political, and distributional costs that the foreign reach of EU law through the so-called 'Brussels Effect' generates and expounding how an 'effective implementation of the Commission's Better Regulation Agenda' and 'the greater incorporation of foreign stakeholders' views as part of the impact assessment process … could mitigate some of the criticisms associated with regulatory imperialism'.

[16] These practices do not only come from the EU itself. One recent example is the letter that ambassadors from 17 southern countries across all continents, including Nigeria, Bolivia, and Indonesia, sent to EU authorities on 7 September 2023 concerning the external effects of the EU Regulation on Deforestation-Free Products (2023), available at https://twitter.com/VidigalGeraldo/status/1700190159549981105. Apart from questioning the regulatory effectiveness and distributive effects of the referred regulation, as a basis for its 'repairment' or 'mitigation', these countries called upon the EU to enhance the procedural qualities of its policymaking in the field by engaging 'in a more meaningful and open dialogue with producing countries than what has been undertaken so far'.

[17] G De Burca, 'Europe's Raison d'Etre' in D Kochenov, F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2013); G De Burca, 'EU External Relations: The Governance Mode of Foreign Policy' in B Van Vooren, S Blockmans and J.Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford, Oxford University Press 2013). See also, Middelaar (n 8): noting that 'this new period of [European] history', far from being 'a struggle between democracy and autocracy', is a 'post-pax Americana' that entails an 'age of encounters with other great powers, other civilizations' and 'demands pluralistic thinking'.

Yet this emphasis on process is neither new nor unique to contemporary developments in transnational law or the law of global governance. It corresponds to an established tradition in modern legal theory that dates back at least to the 1950s, if not earlier. This chapter interconnects this emphasis on process in the studies of the external dimension of EU law and contemporary legal thinking with the broader jurisprudential tradition of process in modern law and legal thought to reflect upon its foundations. The research question informing this chapter is whether and to what extent this 'jurisprudence of process' can contribute to illuminating some of these foundational queries regarding the notion of European transnational private law.

The exploration proceeds in three steps. The next section outlines the 'jurisprudence of process' as a tradition of modern legal theory and its relationship with European law. For these purposes, the section traces the origins of this tradition to distinctive strands of post-war jurisprudence that emerged within the national, international, and transnational contexts during the 1940s and1950s. It also explains how this 'jurisprudence of process' became propelled into EU law and legal thought by influential modes of juristic thinking and concurrent practices, while underscoring the relevant jurisprudential continuities between these national, international, and transnational realms of law and legal thought. This is achieved by characterising this 'jurisprudence of process' as a post-formalist and post-realist approach to modern law and legal thought centred around inter-institutional dynamics of lawmaking and implementation, and by identifying five shared analytical cornerstones that sustain it as a jurisprudential tradition. These analytical cornerstones and its overall characterisation make the jurisprudence of process a productive framework to channel current and future studies on European transnational private law, yet with relevant blind spots or limits that are key to keep in sight.

Section III draws upon this jurisprudential framework to intervene in contemporary studies on the foreign reach of EU law. The section builds on the seminal work by Bradford and Scott, and the insights offered by the different chapters of this volume as well as other complementary studies on the phenomenon. This is done so as to discuss how the notion of European transnational private law grounded on the tradition of process jurisprudence can contribute to expanding and refining the parameters that have been driving this range of contemporary studies on the foreign reach of EU law. Alongside tracing some relationships, (dis-)continuities, and gaps within the literature, this section also identifies some of those limits or blind spots of the jurisprudence of process tradition as applied to the foreign reach of EU private law. This forms the basis for the concluding section that reflects upon these continuities and how to overcome those limits. In that way, the present chapter seeks to sketch a jurisprudential baseline for the prospective development of a research agenda on European transnational private law that can contribute to the relentless search for a renewed *raison d'être* for the EU beyond its frontiers.

II. THE JURISPRUDENCE OF PROCESS AND EUROPEAN LAW

The 'jurisprudence of process' is a relatively overlooked strand within modern law and legal thought. It is a strand of jurisprudence that is largely absent from the canon

of contemporary philosophy of law or legal theory.[18] It is also an account generally absent from the private law canon.[19] This absence is surprising, to say the least, given how ubiquitous the appeals to process and proceduralisation have become in contemporary legal reasoning and developments, including the realm of private law.[20] This gap possibly explains why it has been recently diagnosed, as part of the advancement of a 'new private law theory', that 'the potential for a procedural legitimation of private law is still largely unexplored' and that this is especially relevant for contemporary modes of transnational private lawmaking that 'can no longer build on the symbolic legitimacy of nation state institutions'.[21]

This suggests a puzzle concerning how and why this widespread turn to process and proceduralisation in the external dimension of EU law and contemporary legal thinking can contribute to ground the sprawling phenomenon of transnational private law and thereby inform a research agenda from an EU perspective as the present volume inaugurates. At least one piece of this puzzle can be uncovered through a recollective engagement with the historiographical origins of this process tradition of modern jurisprudence, which has a much longer lineage within Western legal thinking.[22] Based on the reconstruction of this jurisprudential tradition that I've elaborated at length elsewhere, the present section explains what is the 'jurisprudence of process' by outlining the basic tenets and how it relates to European law by expounding on its pivotal place and role in the development of EU law and legal thought.[23]

On this basis, the present section advances three key building-blocks of the overall argument. First, this section elaborates on why the 'jurisprudence of process' deserves to be recognised as a distinctive strand of jurisprudence in the canon of contemporary philosophy of law or legal theory. It also shows that the 'jurisprudence of process' should not be reduced to mere standards of due process or natural justice in

[18] For some notable exceptions that confirm the rule, see, eg, N Duxbury, *Patterns of American Jurisprudence* (Oxford, Clarendon Press, 1995) chs 3–4; and A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford, Oxford University Press, 2016) chapter 5.

[19] See, eg, for two recent accounts of this canon H Dagan and BC Zipursky, *Research Handbook on Private Law Theory* (Cheltenham, Edward Elgar Publishing, 2020); and AS Gold, JCP Goldberg, DB Kelly, E Sherwin and HE Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford, Oxford University Press, 2020).

[20] GP Calliess and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (London, Hart Publishing, 2010); F Cafaggi and HM Watt (eds), *Making European Private Law: Governance Design* (Cheltenham, Edward Elgar Publishing, 2010); R Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society' (2005) 46 *Harvard International Law Journal* 471.

[21] M Renner, 'Formalism, Substantive and Procedural Justice' in S Grundmann, HW Micklitz, M Renner (eds), *New Private Law Theory: A Pluralist Approach* (Cambridge, Cambridge University Press, 2021) 204.

[22] I use the term 'tradition' not in the antimodern sense of a fixed and static set of uses or norms that are typically invoked for reactionary purposes. I use it in the modern hermeneutic sense of some immanent commitments informing a certain strand of thought, which dynamically unfold in history, self-actualising themselves to adapt to renewed socio-cultural circumstances through varied and contending modes of reflexive discourse, as the liberal tradition or the socialist tradition in political thought. On the 'recollective' approach for such a study of ideas in history, I draw methodological inspiration from R Brandom, *Reason in Philosophy: Animating Ideas* (Harvard, Harvard University Press, 2009) 23. I thank my colleague Laura Burgers for alerting me of this ambivalence in the use of the term 'tradition' and the importance of clarifying it.

[23] R Vallejo, 'The Jurisprudence of Process as the Structure of EU Legal Thought and the Crisis of Europe' (draft, on file with the author).

the exercise of legal or political authority, as it is usually done in many contemporary appeals to process or proceduralisation whether in the name of 'legitimacy', 'constitutionalism', 'the rule of law', or 'good governance'. This section rather shows that the jurisprudence of process encompasses a much wider set of analytical/methodological tools and normative commitments to understand and assess contemporary legal developments. In this sense, this recollective engagement with the 'jurisprudence of process' can be read as a mode of immanent critique of those reductive accounts of process and proceduralisation in the external dimension of EU law and contemporary legal thinking more generally. Finally, the section indicates the ways in which the 'jurisprudence of process' has become an integral part of the European legal heritage in special and innovative ways and thereby it is culturally suitable to inform studies of European transnational private law.

From a historiographical perspective, the 'jurisprudence of process' tradition is usually given a specific origin. At least in its seminal formulation, this tradition is generally associated with the renowned teaching materials on *The Legal Process: Basic Problems in the Making and Application of Law* by Henry Hart and Albert Sacks.[24] Albeit not published until the 1990s, the seminal place of these materials is justified not only by the innovative account of law elaborated in these materials and its wide application across several legal fields. Their seminal place is also justified by the huge impact that they had in shaping legal thinking, education, and practice within and beyond the USA since the 1950s.[25] But the focus and relevance of this jurisprudential tradition is not circumscribed to the national realm that informed the scholarly work by Hart and Sacks. One can find equally seminal contributions to the configuration of a 'jurisprudence of process' in the pioneering scholarship by Myers McDougal and Harold Lasswell at the international level and by Philip Jessup at the transnational one as well.[26]

McDougal and Lasswell (Yale Law School) and Jessup (Columbia Law School) were contemporaneous to Hart and Sacks (Harvard Law School) as representatives of post-war jurisprudence. Despite their diverse (even rival) academic affiliations, the different focus and emphases informing their scholarship, and the difficulties of causally proving reciprocal influences, a systematic reading of their scholarship reveals significant continuities or similarities in their respective ways they conceive law and analyse legal developments. From a recollective standpoint, therefore, one can productively conceive their scholarship as pivotal contributions for the development of a distinctive mode of post-war philosophy of law or legal theory to be referred to as the 'jurisprudence of process' tradition, which encompasses the

[24] Hart and Sacks (n 2).

[25] D Kennedy, 'Henry M Hart Jr and Albert M Sacks' in D Kennedy and WW Fisher III (eds), *The Canon of American Legal Thought* (Princeton University Press, 2006) 243, 249: noting that '[a]lthough the Hart and Sacks teaching materials were published only posthumously, in 1994, the course for which they were prepared was taught to a generation of law students at dozens of law schools' and how these 'legal process ideas have been [subsequently] picked up by scholars, judges, and advocates of the left and the right'.

[26] See, in general, HD Lasswell and MS McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Leiden, Martinus Nijhoff Publishers, 1992); and PC Jessup, *Transnational Law* (New Haven, Yale University Press, 1956).

national (Hart and Sacks), international (McDougal and Lasswell), and transnational (Jessup) levels.[27]

What are these continuities that give the 'jurisprudence of process' theoretical cohesion and distinctiveness? Within the canon of modern jurisprudence, law has been typically conceived as a set of abstract and general norms, whether those norms proceed from the will of the sovereign (legal positivism), transcendental reason (natural law), or the circumstantial motivations of judges and other political authorities (legal realism). What makes the 'jurisprudence of process' distinctive and innovative is one basic proposition that defies and seeks to surmount this established account of law. This proposition is that, instead of a set of abstract and general norms, law is better conceived as a process of authoritative modes of decision-making, whereby the concept of 'law' and legal developments are not reduced only to decisions from the legislator (that is, 'statutory law') or courts and tribunals (that is, 'case law') as typically conceived. Integral to this proposition is the observation that these legal processes rather consist of a myriad of actors and institutions with lawmaking capacities, including the legislator, the government/administration, courts, yet also ubiquitous modes of 'private ordering' developed by individuals and a range of civil society institutions. Moreover, these are also regarded as interactive and dynamic lawmaking processes among these varied actors, involving concomitant instances of rulemaking, implementation, monitoring, enforcement, and dispute resolution that operate in sequential, overlapping, or recursive ways and always remain in some significant sense open-ended.[28]

This proposition entails a jurisprudential breakthrough that cannot be overstated. On the one hand, it overcomes the classicist account of law as a sphere that is meant to be insulated from socio-political dynamics by a set of abstract rules that can be neutrally applied to concrete cases through methods of logical deduction. With its emphasis on the inter-institutional, dynamic, and open-ended nature of lawmaking processes, the jurisprudence of process marks a transition from the categorical style of thinking that characterised classical legal thought. This entails a transition towards questions of institutional competence and interaction within lawmaking

[27] Vallejo (n 23). My characterisation of the 'jurisprudence of process' as a post-war philosophy of law or legal theory does not entail overlooking the intellectual influences from the pre-war period that contributed to forge that tradition. For a specialised study of these pre-war influences, see respectively WN Eskridge and PP Frickey, 'A Historical and Critical Introduction to the Legal Process' in Hart and Sacks (n 2); and R Derrig, 'International Law, Science and Psychology in the New Haven School' in R Schäfer and A Petters (eds), *Politics and the Histories of International Law – The Quest for Knowledge and Justice* (Leiden, Brill Nijhoff, 2021).

[28] MS McDougal, 'Law as a Process of Decision: A Policy-Oriented Approach to Legal Study' (1956) 1 *Natural Law Forum* 53, 56: 'what we as law students are, in sum, concerned with is not a mere body of rules but a whole process of decision, and a process of decision taking place within the context of, and as a response to, a larger community process'; and Hart and Sacks (n 2) 5, 161–80: 'The answers to questions such as these [concerning what the law *is*] call always for a perceptive understanding of the role which the particular processes of decision involved play in the total complex of decisional processes which make up the institutional system as a whole.' In the same vein, see Jessup (n 26) 3, 8–9, 11–15. For an updated account of this insight at the national and international levels, often referred to as the 'new legal process,' see WN Eskridge Jr , 'Dynamic Statutory Interpretation' (1986) 135 *University of Pennsylvania Law Review* 1479; and MW Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 *Proceedings of the Annual Meeting (American Society of International Law)* 101.

processes associated with the rise of 'the social' in modern legal thought, expressed through concurrent doctrines of discretion, deference, and modes of weighing among competing public interests or values.[29]

On the other hand, the jurisprudence of process also sought to overcome the rule-scepticism that informed much of the legal realist movement and its anti-formalist implications, by highlighting how and why legal rules matter in these processes of authoritative decision-making. Against the view that conceived law as a mere epiphenomenon of existing power relations, the legal process stressed how socio-political power and authority usually stand in a dialectical dynamic that is ultimately recognised and institutionalised by legal means throughout this range of decision-making processes at the national and international levels.[30] The legal process tradition thus sought to overcome the tension between formalist and realist approaches to modern jurisprudence by productively transcending them through building upon several of their respective insights. For these reasons, the legal process tradition is widely regarded a post-formalist and post-realist strand of modern legal theory.[31]

One illustration of the innovative account of law introduced by the jurisprudence of process comes from the contemporary law of climate change. Within growing socio-political concerns over exponential levels of global warming, much of the lawyerly attention has been focused on certain specific legal developments. Whether it is the 'Green Deal' legislative package advanced by the European Union or widespread modes of climate change litigation against governments and transnational corporations, most legal discussion focuses upon statutory law or case law outputs as a proxy for what is the contemporary 'law of climate change'. Think of the growing expectation that the prospect of an advisory opinion from the International Court of Justice on the 'Obligations of States in Respect of Climate Change' under international law is generating as a reaffirmation or a potential source of transformation with respect to current legal developments.[32]

Yet, from a jurisprudence of process perspective the law of climate change cannot be reduced to any of these specific legal decisions or developments, whether they come from courts or legislators. According to the jurisprudence of process, the 'law of climate change' is better represented by the totality of modes of authoritative

[29] For a reconstruction of these modes of legal thought, see in general D Kennedy, 'Two Globalizations of Law & Legal Thought: 1850-1968' (2003) 36 *Suffolk University Law Review* 631.

[30] The point is perhaps most eloquently articulated with respect to international law by MS McDougal and HD Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *The American Journal of International Law* 1, 3: 'The processes of law have as their proper office the synthetizing and stabilizing of creative efforts towards a new order by the procedures and structures of authority, thereby consolidating gains and providing guidance for the next steps along the path towards a universal system. By pretending in one mood that international law is a contemporary and presumably well-constructed edifice [of merely formal rules] while insinuating in another that it is a pretentious and dubious fantasy, the true dimensions of the task are concealed.'

[31] N Duxbury, 'Postrealism and the Legal Process' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Hoboken, John Wiley & Sons, 2010).

[32] See, International Court of Justice, 'The General Assembly of the United Nations Requests an Advisory Opinion from the Court on the Obligations of States in Respect of Climate Change' (Press Release, 19 April 2023), available at www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf.

decision-making concerning the problem of climate change – whether official or unofficial, hard or soft law – including the decisions of other competent authorities, such as administrative agencies, international organisations, and concurrent modes of private ordering that develop as a result or alongside these official decisions at every stage of the policy process at the national, international, or transnational levels. The 'law of climate change' is thus not the result of some latest legal decision or policy programme that must be only understood retrospectively. It is rather the open-ended result of a dynamic, interactive process of authoritative decision-making among several types of governmental and civil society institutions within and beyond the state that needs to be understood both retrospectively and prospectively as part of continuing hermeneutic spirals through which renewed norms or understandings may emerge.[33]

The instantiation of this basic proposition in several types of private relations already signals the prominent place and role held by ubiquitous modes of socio-economic ordering among individuals or civil society institutions within this jurisprudential framework. Moreover, as the epigraph from the seminal textbook by Hart and Sacks highlights, private law, as the general framework of these modes of socio-economic ordering, is assigned an integral place and role within this jurisprudential framework.[34] In fact, due to the integral place and role of private law within its jurisprudential framework, the legal process has been regarded as distinctively reintegrating within the canon of modern legal thought 'a kind of private- or common-law sensibility to a new public-law world' that was taking shape at the time.[35] This makes the process tradition *prima facie* a suitable jurisprudential framework for a research agenda on transnational private law.

As a post-formalist and post-realist approach to modern law and legal thought, the referred basic proposition informing the 'jurisprudence of process' is complemented by at least five shared corollaries informing the scholarship of Hart and Sacks, McDougal and Lasswell, and Jessup that merge key formalist and realist insights in renewed and productive ways. These corollaries represent the basic analytical pillars or cornerstones of the jurisprudence of process tradition. Given that law is better conceived as a dynamic and open-ended process of authoritative decision-making rather than a set of merely abstract norms, the first cornerstone is that an

[33] For an earlier application of the jurisprudence of process to the field of international environmental law, see RM Bratspies, 'Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development' (2007) 32 *Yale Journal of International Law* 363. See also, D Bodansky, 'Climate Change: Transnational Legal Order or Disorder?' in T Halliday and G Shaffer (eds), *Transnational Legal Orders* (New York, Cambridge University Press, 2015).

[34] As Hart and Sacks further explain: 'There are elements of a chicken-and-egg relationship between private decisions and official decisions in the flow of social living which defy any facile description of the process. Two broad conclusions, however, seem warranted: 1) The structure of official institutions is immensely significant in shaping the general character and direction of private activity, since it determines both the permissible range of private decision and the conditions under which the decisions are made: 2) Within this general framework, the mass of private decisions are the primary motive force which determine the direction of the society from day to day. It is useful to think of the working apparatus of official procedures, taken as a whole, as engaged in a continuous review of these private decisions, and in continuous revision of the terms and conditions under which similar decisions will be made in the future.' In a similar vein, see McDougal (n 28) 56–58; and McDougal and Lasswell (n 30) 8.

[35] Kennedy (n 25) 247.

appropriate entry-point to grasp and understand the nature and significance of law is a pragmatic focus on concrete 'problems' rather than first principles.[36] What is theoretically distinctive and methodologically innovative about this pragmatic approach? And more importantly for the purposes of this research agenda, how and why can this approach be relevant for the study of the external dimension of EU private law through a transnational lens? As eloquently remarked by Friedrich Kratochwil for the context of contemporary legal thinking (and as a teaser of what this chapter elaborates in section III):

> Beginning with the analysis of a 'problem,' rather than with the blueprint of higher order principles has some advantages. Since there is no actual blueprint from which institutions diverge but only a set of feasible, but problematic alternatives, attention is not restricted to this divergence, but to the more complicated issues of comparing and choosing between feasible alternatives, which makes the analytical enterprise more 'useful.' … [This requires] a *conscious reflection on the very criteria we use* when we judge different alternatives, a problem that blueprint analysis tends to marginalise. In addition, the appropriate methodological tools are no longer those of building grand theories, but of identifying 'cases,' of keeping one's eyes open for surprises, rather than clearing the ground right at the beginning and dispensing with ambiguities through clear-cut definitions and 'operationalisations' of the key terms.[37]

The second cornerstone informing the jurisprudence of process represents the Janus face of these pragmatist commitments. This cornerstone is the need to embrace a socio-legal approach regarding the sources of law and legal developments that underscores the interplay between law and concurrent socio-economic processes.[38] From this socio-legal purview and pragmatic focus stems the third cornerstone: the importance of analysing legal developments 'in context'. This is done by tracing the range of considerations that inform legal decisions, as well as the drivers that explain concurrent patterns of institutional reproduction or change.[39] As section III also further elaborates, these last two cornerstones of process jurisprudence are key to contemporary studies of transnational private law.[40]

[36] The textbook by Hart and Sacks is particularly illustrative in these respects, as the whole analytical construction is based on the discussion of 9 concrete 'problems' associated with representative 'cases', such as 'problem 1 – the case of spoiled cantaloupes', 'problem 3 – the case of the jittery landlady', or 'problem 6 – the case of the absent veteran', *cf*, Likewise, see Jessup's table of contents in *Transnational Law* (n 26) and 11: 'To the understanding of transnational legal problems we then address ourselves.' Regarding the pragmatist commitments informing New Haven School at Yale, see the revisionist study by R Derrig, 'Educating American Lawyers: The New Haven School's Jurisprudence of Personal Character' (2020) 31 *European Journal of International Law* 829.

[37] F Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge, Cambridge University Press, 2014) 288.

[38] Hart and Sacks (n 2) 2–4 (on the normative dimension of 'civil associations'), 161–63 (on 'private lawmaking'), 167–68 (on 'local institutions'), 174–80 (on 'lawyer-made law'); McDougal and Lasswell (n 30) 15–22; Jessup, (n 26) 3, 6, 8–9, 11–15.

[39] See, eg, MS McDougal, 'The Impact of International Law upon National Law: A Policy-Oriented Perspective' (1959) 4 *South Dakota Law Review* 25; and Jessup (n 26) 32–34, 46–51, 58.

[40] Calliess and Zumbansen (n 20) xiii: stressing 'the elusiveness of settling on a definite model of law through which one could distinguish in a clear-cut way between law and non-law' and explaining that 'the attempt to make this very distinction always occurs in a particular context, with a particular set of stakes, interests, and conditions [, which requires] the "application" of legal theory to these different contexts from the perspective of asking "what is at stake?" and "for whom?" [in theses] discursive forms of boundary-drawing between "law" and "non-law"'.

The fourth cornerstone concerns the normative dimension informing the jurisprudence of process. Despite some different emphases among its authors, this normative component is generally driven by a purposive drive towards immanent or policy values, which gives the jurisprudence of process an evaluative grip on legal developments.[41] The final corollary is the most salient, influential, and yet controversial pillar of the jurisprudence of process: the prevalence that it gives to procedural arrangements over substantive ones in the configuration of legal-political orders. The legal process school at Harvard is usually regarded as the poster child in these respects due to their open affirmation of this idea.[42]

This proceduralist model of legitimacy informing the jurisprudence of process has been the object of stringent jurisprudential criticism. At the national level, these criticisms have been mainly focused on the de-politicising effects that this model has on legal outcomes.[43] At the international level, its ingrained apologetic tendencies to regard whatever represents good foreign policy for the USA (or any state that is circumstantially exerting hegemonic power at the global level) by itself lawful.[44] These stringent criticisms certainly make the jurisprudence of process – as a potential ground for the study of European transnational private law – controversial. They are also particularly relevant to keep in sight for reflective study of the foreign reach of EU law that has been openly regarded as having become a (more-or-less benevolent) 'global regulatory hegemon'.[45]

Nonetheless, from a recollective standpoint, it is relevant to underscore that in its original formulation this prevalence given to process was not based on some ready-made account of '(input or throughput) legitimacy', 'social welfare',

[41] See, eg, at the international level, HD Lasswell and MS McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 *The Yale Law Journal* 203; and HD Lasswell and MS McDougal, 'Jurisprudence in Policy-Oriented Perspective' (1966) 19 *University of Florida Law Review* 486. At the transnational level, see Jessup (n 26) 33–34, 71. For some specialised studies on these normative dimensions informing the scholarship of Hart and Sacks, WN Eskridge Jr , 'Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling between Facts and Norms' (2012) 57 *Saint Louis University Law Journal* 865; and CL Barzun, 'The Forgotten Foundations of Hart and Sacks' (2013) 99 *Virginia Law Review* 1.

[42] 'These institutionalized procedures and the constitutive arrangements establishing and governing them are obviously more fundamental than the substantive arrangements in the structure of a society, if not in the realization of its ultimate aims, since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively' Hart and Sacks (n 2) 3–4. In the same vein at the international and transnational levels, see respectively Jessup (n 26) 35–36, 70–71.

[43] G Peller, 'Neutral Principles in the 1950's' (1987) 21 *University of Michigan Journal of Law Reform* 561; MJ Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford, Oxford University Press, 1992) 271: 'the legal process materials symbolize the moment in post-war history at which the New Deal lawyers' conception of the "common interest" came to be thoroughly transformed from one of substance to one of procedure'.

[44] OR Young, 'International Law and Social Science: The Contributions of Myres S McDougal' (1972) 66 *American Journal of International Law* 60; RA Falk, 'Casting the Spell: The New Haven School of International Law' (1994) 104 *Yale Law Journal* 1991; and BH Weston, O Schachter, WM Reisman, RA Falk, and MS McDougal, 'McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 *Proceedings of the Annual Meeting (American Society of International Law)* 266.

[45] Bradford (n 1) 3–4, 7, 21, 24, 64, 81, 249, 265, 288: arguing that 'the Brussels Effect is therefore not only pervasive today, but there is a convincing argument that it will persist, extending the EU's regulatory hegemony into the foreseeable future'. In this vein, see also, HW Micklitz, 'Epilogue: the Role of the EU in the External Reach of Regulatory Private Law – Gentle Civiliser or Neoliberal Hegemon?' in M Cantero and HW Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Cheltenham, Edward Elgar Publishing, 2020).

'constitutionalism', 'good governance' or any other value that is taken for granted and merely imposed on practice as it has become in many natural law-driven contemporary pleas for proceduralisation.[46] Nor is it driven by a disdain for substance. It is rather driven by the understanding that process is a condition for substance. In other words, the prevalence of process is driven by the understanding that in order to tackle substantive questions of common concern, the first political question that any social group needs to address is how and by whom those substantive decisions are going to be made.

This first political question is usually addressed through the design (or re-design) of institutions with suitable competences to duly tackle these substantive questions or the institutionalisation of relevant procedures for doing so among existing institutions. These dynamics of legal-political representation thereby largely operate through 'institutionalised normative orders' (MacCormick) or modes of 'institutionalised authoritative collective action' (Lindahl). These institutionalised activities are nevertheless susceptible of socio-political contestation on substantive grounds by the participants in or affected by those institutionalised practices and thus stand in a dialectical relationship with their own negation, which may eventually prompt modes of institutional reproduction, obliteration, or transformation.[47] This signals part of the theoretical depth of the jurisprudence of process since its original formulation, as process arrangements are in this sense constitutive.[48]

In sum, the jurisprudence of process emerged during the 1950s as a post-formalist and post-realist approach within modern law and legal thought, which nevertheless productively blended several of the key formalist and realist insights, such as law's social basis, its normative dimension, and its constitutive properties. Its key innovative move is the view of law as an interactive and dynamic process of authoritative decision-making among different institutions rather than a set of merely abstract and self-fulfilling norms. This conception of law is paralleled with at least five core

[46] For a discussion, see P Zumbansen, 'The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy' in MA Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge, Cambridge University Press, 2015); and B Kingsbury, M Donaldson and R Vallejo, 'Global Administrative Law and Deliberative Democracy' in A Orford, F Hoffman and M Clarke (eds), *The Oxford Handbook of the Theory of International Law* (Oxford, Oxford University Press, 2015).

[47] I borrow the notion of 'institutionalised normative orders' from Neil McCormick and the notion of 'institutionalised authoritative collective action' from Hans Lindahl, whose work I read as a continuation of this tradition for the contemporary landscapes of national or post-national law: *cf*, N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford, Oxford University Press, 2007); and H Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge, Cambridge University Press, 2018). In this vein, see also J Black, '"Says Who?" Liquid Authority and Interpretive Control in Transnational Regulatory Regimes' (2017) 9 *International Theory* 286.

[48] It is worth retrieving the (in)famous quote from Hart and Sacks highlighted above to stress this point: 'These institutionalized procedures and the *constitutive arrangements establishing and governing them* are obviously more fundamental than the substantive arrangements in the structure of a society, if not in the realization of its ultimate aims, since *they are at once the source of the substantive arrangements and the indispensable means of making them work effectively*' Hart and Sacks (n 2) 3–4 (emphasis added). With respect to the New Haven School, see in this vein H Saberi, 'Love It or Hate It, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity' (2012) 35 *Boston College International and Comp Law Review* 59, reviewing the 'antifoundational foundationalism' upon which the New Haven School relies; Bianchi (n 18) 96–97: analysing how the New Haven School account of law 'expresses a dialectical process between authority and power, the two basic concepts that the movement attempted to reconcile through its methodology'.

analytical pillars or cornerstones: (1) a pragmatic focus on concrete 'problems' rather than first principles; (2) a socio-legal purview of the basis and sources of law; (3) a contextual approach to legal developments; (4) its normative dimension driven by a purposive drive towards immanent or policy values; and (5) the prevalence given to process and institutive arrangements due to their constitutive properties. These five pillars thus operate as the theoretical and methodological cornerstones that give shape to the jurisprudential edifice of the process tradition.

Even if the jurisprudence of process had its most salient articulation and influence in US law and legal thought, it is important to stress that this jurisprudential edifice is not exclusively a US patrimony. The development of the jurisprudence of process as a tradition has an entrenched and significant relationship with European law and legal thought as well. To conclude this section, the chapter briefly elaborates on at least two marks of this relationship. This first mark is genealogical. The second mark is structural.

The genealogical mark involves how most of the referred analytical pillars or cornerstones of the jurisprudence of process relate with eminent ancestors and successors in European legal thinking that have distinctively built upon and further develop its original formulation. As to its ancestors, for instance, it has been noted that in their pluralist account of law and legal developments, the lineages of process-based legal theory can be traced to European strands of legal anthropology or sociological jurisprudence and the towering figure of Eugen Ehrlich in particular.[49] Nonetheless, the insights of the jurisprudence of process on the *jurisgenerative* capacity of social practices and the inter-institutional dynamics that drive modern lawmaking possibly find their most direct European predecessors in the institutionalist legal theories advanced during the early twentieth century by prominent European scholars in Italy,[50] France,[51] and Germany.[52] Whether in its legal pluralist or institutionalist variants, as a tradition the jurisprudence of process has in this sense some deep roots in European legal thinking.[53]

[49] Kennedy (n 25) 251. The reference is to E Ehrlich, *Fundamental Principles of the Sociology of Law* [1913] (Transaction Publishers, 1962). For a retrospective on Ehrlich's contemporary relevance, see M Hertogh (ed), *Living Law: Reconsidering Eugen Ehrlich* (London, Bloomsbury Publishing, 2008); and G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Brookfield: Dartmouth, 1997) 3–28. Legal pluralism is of course a much wider tradition in itself within European law and legal thought. For a reconstruction of this tradition, see VM Muniz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford, Oxford University Press, 2014).

[50] S Romano, *L'ordinamento giuridico* [1917] (Sansoni, 1962); and, for a recent English translation, S Romano, *The Legal Order* (Oxfordshire, Routledge, 2017). On the jurisprudential breakthrough and the significance of Romano's work, see S Tschorne, 'What is in a Word? The Legal Order and the Turn from "Norms" to "Institutions" in Legal Thought' (2020) 11 *Jurisprudence* 114.

[51] M Hariou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism [1925]' in A Broderick (ed), *The French Institutionalists: Maurice Hauriou. Georges Renard, Joseph T. Delos* (Boston, Harvard University Press, 1970). See, in general, Broderick, ibid.

[52] C Schmitt, *On the Three Types of Juristic Thought* [1934] (Wesport, Praeger Publishers, 2004). For a specialised study of the transition from a 'decisionist' to an 'institutionalist' legal theory in Schmitt's jurisprudence, see M Croce and A Salvatore, *The Legal Theory of Carl Schmitt* (Cheltenham, Routledge, 2013).

[53] For a reconstruction of these pluralist/institutionalist lineages in European legal thinking, and its projections into US law and legal thought through the influential work of Robert Cover at Yale Law School, see M Loughlin, *Political Jurisprudence* (Oxford, Oxford University Press, 2017), chapter 6 on 'Law as Institution'.

The same applies to some of its most salient successors. Within its legacy, the jurisprudence of process tradition comprises some of the most prominent figures in US legal theory during the twentieth century, such as Lon Fuller,[54] Philip Selznick,[55] and Ronald Dworkin.[56] Yet it also comprises prominent European figures as well. As revisionist studies have recently documented, this partly includes HLA Hart.[57] But probably the closest and most prominent successors of the jurisprudence of process within Europe are Neil McCormick, Jurgen Habermas, Niklas Luhmann, and Gunther Teubner due to their elaboration of institutional grounds of lawmaking and their overall commitment to process and proceduralisation as a way to enhance the epistemic qualities of legal decisions, whether in national[58] or post-national contexts.[59] Alongside the seminal scholarship of Joseph HH Weiler, who likewise based his account on a 'theory of equilibrium' among legal and political institutions structuring European integration, it is largely through their influential accounts of legal theory that the 'jurisprudence of process' came to shape pervasive modes of legal thinking regarding the role of law in the 'constitution of Europe' as a peculiar kind of post-national polity and its subsequent transformations.[60]

The second mark of the relationship between the jurisprudence of process and European law is equally or perhaps even more relevant. This mark concerns how the account of law advanced by the jurisprudence of process, as an institutionalised and dynamic process of authoritative decision-making, has had a foundational place and

[54] LL Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630–72. See also, for an illuminating review of the jurisprudence of Fuller underscoring this aspect, K Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (London, Bloomsbury Publishing, 2012).

[55] P Selznick, 'Sociology and Natural Law' (1961) 6 *Natural Law Forum* 84. See also, for the latest instantiation of this overall agenda in legal sociology, P Selznick, *A Humanist Science: Values and Ideals in Social Inquiry* (Stanford, Stanford University Press, 2008).

[56] VA Wellman, 'Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks' (1987) 29 *Arizona Law Review* 413–74.

[57] GC Shaw, 'HLA Hart's Lost Essay: Discretion and the Legal Process School' (2013) 127 *Harvard Law Review* 666; and N Lacey, 'The Path Not Taken: H.L.A. Hart's Harvard Essay on Discretion' (2013) 127 *Harvard Law Review* 636. See also, on the overall context informing Hart's journey to the USA and his experience within the 1956–1957 Legal Philosophy Discussion Group at Harvard where he engaged with the emergent legal process school, N Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford, Oxford University Press, 2004) ch 8; and GC Shaw, 'The Rise and Fall of Liberal Legal Positivism: Legal Positivism, Legal Process, and H.L.A. Hart's America, 1945-1960' PhD thesis (Oxford, University of Oxford, 2013), available at https://ora.ox.ac.uk/objects/uuid:e7ea644b-0d13-4a60-8993-e4119404a5ca.

[58] See N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (London, Springer Science & Business Media, 1986); Habermas (n 9); N Luhmann, *Law as a Social System* [1993] (Oxford, Oxford University Press, 2004); and G Teubner, *Law as an Autopoietic System* (Blackwell, 1993). See also, in general, M La Torre, *Law as Institution* (London, Springer Science & Business Media, 2010).

[59] See N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, Oxford University Press, 2002); J Habermas, 'A Political Constitution for the Pluralist World Society?' (2013) 40 *Journal of Chinese Philosophy* 226; and G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford, Oxford University Press, 2012).

[60] See, in general, J Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999); and M Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge, Cambridge University Press, 2011).

role in the practical configuration of EU legal reasoning as a driving force of European polity-building. Drawing upon methods from critical sociology, Antoine Vauchez has recently documented how the social imaginary of the EU as a post-national polity has been largely driven in practice by a diverse set of influential 'Euro-lawyers' based upon a vernacular of institutional autonomy, supranationalism, and a purposive role of law attuned to policy values related to internal-market building. That vernacular is nevertheless not theorised by Vauchez. As I have shown elsewhere, that vernacular relates to an understanding of the place and role of law in the process of European integration that largely corresponds with the conception of law and basic tenets informing the jurisprudence of process.[61] The jurisprudence of process thus represents the structure upon which these Euro-lawyers had been (and largely still are) more or less consciously operating when 'brokering Europe'.[62]

Due to this foundational place and role that the jurisprudence of process and European law have reciprocally had at genealogical and structural levels, as a living tradition the jurisprudence of process can thus nowadays be considered as an integral part of the European legal heritage and thereby culturally suitable to inform studies of European transnational private law. This section has shown how this tradition goes well beyond mere appeals to standards of due process or natural justice in legal/political decision-making as in much of contemporary appeals to proceduralisation. It also showed why this tradition includes a distinctive and innovative account of law that encompasses the national, international, and transnational levels. Yet to what extent and upon what bases may this jurisprudential tradition inform the agenda of a European transnational private law? That is the question that this chapter now tackles.

III. ENGAGING WITH EUROPEAN TRANSNATIONAL LEGAL PROCESSES

The previous section outlined the basic components or contours of the 'jurisprudence of process' as a distinctive strand of modern legal theory and its relationship with EU law and legal thought. Among other points, the previous section signalled that the 'jurisprudence of process' represents the vernacular upon which EU legal thinking and developments have largely proceeded. By moving from the abstract realm of theoretical lineages of contemporary legal thought to the particular realm of case studies, this section takes one further step in the argument. It does so by expounding on the suitability of the legal process as a framework to identify, understand, and assess different instantiations of the foreign reach of EU law through the notion of European transnational private law.

[61] Vallejo (n 23).

[62] A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge, Cambridge University Press, 2015): stressing that: 'the "field effect" is not to be found in the judicial coup of an "invisible college" of Euro-lawyers taking over power and designing this or that public policy, than in the field's specific contribution in the shaping of cross-sectoral and inter-institutional frames of understanding Europe's fragmented polity, thereby providing a privileged locus for the metamorphosis of the inchoate set of treaties, institutions, and groups into one new polity'.

For this purpose, the section draws from the several specialised studies on the foreign reach of EU private law within this edited volume or related literature and interconnects them through the lens of process jurisprudence as outlined in section II. By relating the abstract to the concrete, the section reviews the ways in which different European transnational legal processes concerning issues of private law are currently taking shape and highlights how several patterns, (dis-)continuities, and gaps emerge. In this way, the section seeks to invite and inspire future pathways for development of the research agenda on European transnational private law based on a jurisprudence of process register.

Yet this range of studies does not stand in a theoretical vacuum. Anu Bradford and Joanne Scott have developed pivotal accounts of how and why EU law is achieving a foreign reach beyond EU frontiers. This has been informed by several case studies tracing this phenomenon in varied socio-economic realms. Using the lens of European transnational private law informed by the 'jurisprudence of process' (that is, European transnational legal processes), this section relates the several chapters in the present volume with that range of pivotal studies on the foreign reach of EU law. This in turn illuminates how such a lens can contribute to expanding and nuancing the insights drawn from Bradford and Scott's studies on the phenomenon in at least three distinctive ways.

A. Conceptually – From an International Relations Paradigm to a Transnational Relations Paradigm that Critically Encompasses the Constitutive Role of Private Law

Much of the literature on the external dimension of EU law has been driven by an international relations paradigm. This is a paradigm where the object of analysis is largely centred upon relations between and among the EU, its Member States, foreign governments, and established international institutions, such as international organisations or international courts and tribunals, as relevant actors. In line with the anthropomorphic assumptions of the legal discipline, these actors are usually conceived as separate and unified entities that normally operate through unilateral, bilateral, or multilateral modes. It is also a paradigm largely structured upon a multilevel imaginary of how global governance is conducted. This is a structure where interactions between the EU and foreign countries or regions are generally represented on a horizontal plane, while the EU's interactions with its Member States or international institutions in developing or implementing foreign policy agendas are generally represented on a vertical plane. In their focus on a distinctive set of actors, norms, and modes of foreign agency, the external dimension of EU law as an emergent field of legal studies and practice thereby becomes largely driven by a conceptual framework generally associated with public law.

The pivotal studies of Bradford and Scott are apt illustrations of this characterisation. Bradford conceives the Brussels effect essentially as a unilateral mode through which EU law is travelling abroad, which, as a market-driven phenomenon,

largely proceeds on a horizontal plane with respect to foreign countries or regions.[63] This occurs through two distinct ways that usually proceed in tandem. One is the *de facto* Brussels effect, where EU law travels beyond EU frontiers via transnational corporations that under certain conditions are prompted to *de facto* align their production or operations abroad with EU norms. Bradford explains that this means of EU law's foreign reach is unilateral, because 'no regulatory response by foreign governments is needed; [under the referred-to conditions,] corporations have the business incentive to extend the EU regulation to govern their worldwide production or operations'.[64] Global market forces carrying the Brussels effect thus appear as largely naturalised within this framework, while transnational corporations, albeit key actors for its operation, are represented as mere carriers of EU norms concerning market regulation abroad.

The second is the *de jure* Brussels effect. According to this second variant, a EU legal rule or institution that originally travelled *de facto* through leading corporations ends up becoming *de jure* adopted or institutionalised by competent regulators within foreign legal regimes. This usually happens due to lobbying by these transnational corporations that carried the EU norm to ensure a level playing field with their local competitors in foreign countries (which Bradford terms the 'strict' notion of the *de jure* Brussels effect), or can also happen in relation with other concurrent means or factors (that is, the 'broad' notion of the *de jure* Brussels effect).[65] As a 'market-driven mechanism', Bradford analytically distinguishes the Brussels effect as a unilateral means of foreign reach of EU law from other means that are 'treaty-driven', whether they are 'bilateral' (such as treaties or other agreements with foreign governments) or 'multilateral' (through influencing policy choices of international or global governance institutions).[66] The analysis thus focuses on a distinctive set of actors and modes of foreign agency.

[63] 'The term the "Brussels Effect" refers to the EU's unilateral ability to regulate the global marketplace … While acknowledging that other forms of the EU's global influence exist, this book generally reserves the term the Brussels Effect to capture the phenomenon where the markets are transmitting the EU's regulations to both market participants [*de facto*] and regulators [*de jure*] outside the EU.' Bradford (n 1) 1.

[64] Bradford (n 1) 2–3: '*de facto* Brussels Effect is the primary focus of this book and the core of [its] theoretical discussion in chapter 2' where Bradford elaborates on each of its enabling conditions or causes: (i) market size; (ii) regulatory capacity; (iii) stringent regulations; (iv) inelastic targets; and (v) legal, technical, or economic non-divisibility of the referred product or conduct.

[65] This distinction between 'strict' and 'broad' notions of the *de jure* Brussels effect is relevant because, in contrast with the 'strict' approach, the broader notion of the *de jure* Brussels effect '-including the diffusion of EU norms through international treaties and institutions- … has not been extensively examined except in narrow policy areas and with respect to selected jurisdictions.' By adopting this broader notion, Bradford aims 'to show how pervasive the *de jure* emulation of EU regulations is and how the *de jure* Brussels Effect complements and interacts with the de facto Brussels Effect. Together, this will hopefully offer a more comprehensive picture of the EU's influence.' Bradford (n 1) 2–3 (and for illustrative references from the case studies contained in the book), 94–96.

[66] Bradford (n 1) 82–91. It is relevant to clarify that Bradford advances the Brussels effect as a general 'theory of unilateral regulatory power' that is only circumstantially applicable to the EU nowadays. As Bradford explains, 'While developed to explain the Brussels Effect and the EU's role as a global regulatory hegemon, the conditions discussed in this chapter are generic as opposed to EU-specific, and hence designed to explain any jurisdiction's ability to unilaterally supply rules for the global marketplace. In this sense, they should outlive the EU's regulatory hegemony and also help us explain if and when such a hegemony might come to an end or be displaced by another unilateral global regulator, [such as the]

These categories and overall representation are also present in the influential scholarship of Joanne Scott. Albeit already figuring in her seminal essay,[67] these categories are most visible in her latest take on the phenomenon expressed in a co-edited volume with Marise Cremona on 'EU Law beyond EU borders'. In their introductory essay to a set of specialised studies in varied policy fields, Cremona and Scott explain that this 'global reach of EU Law' proceeds through different means. They used the agency-based model to classify these means as unilateral (which comprises 'the extraterritorial application of EU law, the presence of territorial extension, and the so-called "Brussels Effect"'), bilateral ('in the form of agreements with third countries or third country agencies'), or multilateral (through 'the EU's engagement with multilateral fora and the negotiation of international legal instruments'). As in Bradford's transition from a *de facto* to a *de jure* Brussels effect in its 'broader' variant, Cremona and Scott also end up stressing 'the need to appreciate the relationship between these different modes of EU action – unilateral, bilateral and multilateral – and the ways in which they interact' in shaping this global reach of EU law.[68]

This public law framework has been also largely informing other specialised studies on the external dimension of EU law. Some studies have mainly focused on the horizontal extension of EU law to foreign countries or regions in certain policy fields through unilateral or bilateral modalities.[69] Others have focused on the vertical plane regarding how the interactions between the EU and multilateral institutions at the international level are either shaping the global governance agendas of these institutions or are reciprocally shaping the EU's own domestic agendas.[70] Like Bradford and Scott, other studies have generally encompassed the horizontal and vertical spatial planes by either focusing on specific policy fields[71] or on a particular type of actor.[72] In any of their variants, the use of such a public law framework aligns this range of studies with the type of issues driving the established fields of EU External Relations Law and EU Foreign Relations, whether in their focus on

"Washington Effect" or the "Beijing Effect" – as long as the United States or China had the combination of the market power, the regulatory capacity, and the political will to generate stringent regulations, together with the desire to pursue inelastic targets that are non-divisible across jurisdictions.' Bradford (n 1) 4, 64.

[67] Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 3) 89, 108: explaining that 'while many EU measures giving rise to territorial extension are unilateral, they are characterized by an international orientation nonetheless' because 'the EU uses also uses territorial extension both to prompt the emergence of international (bilateral or multilateral) agreements'.

[68] Cremona and Scott, 'Introduction – EU Law Beyond EU Borders' (n 15) 1–3.

[69] See, eg, Rodrigues (n 4); Giegerich (n 4) pt 4; Hadjiyianni (n 4); L Pantaleo, *The Participation of the EU in International Dispute Settlement: Lessons from EU Investment Agreements* (Berlin, Springer, 2018); and Ankersmit (n 4).

[70] See, eg, Eritja (n 4); M Cremona, A Thies, and RA Wessel (eds), *The European Union and International Dispute Settlement* (London, Bloomsbury Publishing, 2017); KE Jørgensen and KV Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Berlin, Routledge, 2013); and Kochenov and Amtenbrink (n 17). In the case of the latter, see mainly C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford, Oxford University Press, 2019).

[71] A Bakardjieva, M Mårtensson, L Oxelheim, and T Persson (eds), *The EU's Role in Fighting Global Imbalances* (Cheltenham, Edward Elgar Publishing, 2015); and Fahey (n 4) focusing on the Area of Freedom, Security, and Justice (AFSJ).

[72] Hofmann, Vos, and Chamon (n 4).

questions of legal validity or competence of the EU or its Member States to act in a certain foreign policy domain[73] or their capacity to influence foreign policies and global governance agendas.[74]

By instead concentrating on the place and role of EU private law and civil society institutions within this phenomenon, the present volume, and the overall research project in which it is embedded, can be understood as transcending the 'international relations' paradigm towards a renewed 'transnational relations' paradigm. Notwithstanding pioneering work on transnational law by Jessup and his successors, the move from international to transnational relations as a renewed paradigm has only gained exponential traction and development within foreign affairs studies since the *fin de siècle*. This renewed paradigm departed from the observation that a diverse fauna of non-state entities held a significant place and role in the exercise of legal-regulatory authority within several domains of external affairs – whether it is, for instance, international trade, security, migration, or development. These non-state entities include formal organisations, such as transnational corporations, chambers of commerce, NGOs, and labour unions, as well as more informal professional networks or advocacy groups that were, through different means, significantly shaping foreign policies and dynamics of co-operation and resistance in these global governance realms. This insight prompted the analytical need to move beyond the focus on states or international institutions as objects of enquiry – whether in its intergovernmental or supranational variants – as a condition to understand the dynamics of foreign policy, world politics, and its concomitant legal developments.[75]

This broader focus has triggered a growing interest in the place and role of private law within this post-national context.[76] Beyond the public law frame of reference that has been informing the seminal work of Scott and broader literature on the external dimension of EU law, in this vein, one of the marks of the FiDiPro project informing

[73] See, eg, M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (London, Bloomsbury Publishing, 2014); P Koutrakos, *EU International Relations Law* (Bloomsbury Publishing, 2015); E Neframi and M Gatti, *Constitutional Issues of EU External Relations Law* (Nomos Verlag, 2018); M Andenas, L Pantaleo, M Happold, and C Contartese (eds), *EU External Action in International Economic Law: Recent Trends and Developments* (Springer Nature, 2020); and WT Douma, C Eckes, PV Elsuwege, E Kassoti, A Ott, and RA Wessel, *The Evolving Nature of EU External Relations Law* (The Hague, TMC Asser Press, 2021).

[74] S Keukeleire and T Delreux, *The Foreign Policy of the European Union* (London, Bloomsbury Publishing, 2022); and KE Jorgensen, AK Aarstad, E Drieskens, K Laatikainen, and B Tonra, *The SAGE Handbook of European Foreign Policy* (Los Angeles, SAGE, 2015).

[75] For some influential studies in this renewed transnational relations framework, see JN Rosenau and E-O Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge, Cambridge University Press, 1992); S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, Cambridge University Press, 1996); and S Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages* (Princeton, Princeton University Press, 2006). See also, more recently, W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton, Princeton University Press, 2009); and DD Avant, M Finnemore, and SK Sell (eds), *Who Governs the Globe?* (Cambridge, Cambridge University Press, 2010).

[76] For some prominent accounts, see R Michaels and N Jansen, 'Private Law beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *The American Journal of Competition Law* 843–90; P Zumbansen, 'Private Ordering in a Globalizing World: Still Searching for the Basis of Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 181; R Wai, 'The Interlegality of Transnational Private Law' (2008) 71 *Law and Contemporary Problems* 107; and H Muir Watt, 'Private International Law beyond the Schism' (2011) 2 *Transnational Legal Theory* 347.

the present book has been to illuminate the relevance of EU private law within this phenomenon and contemporary developments in EU external relations law.[77] This focus is taken up by the several chapters in this volume that trace and evaluate the foreign reach of EU private law within several socio-economic realms, such as finance (Chadwick, chapter nine and Macacci, chapter 10), trade (Mataija, chapter 11), tax (Pantazatou, chapter 12), labour (Liukkunen, chapter six), non-discrimination (Möschel, chapter seven), and sustainability (Ulfbeck, chapter 13 in addition to Salminen, Rajavuori, and Eller in chapter 14). This distinctive focus has been paralleled by an emerging interest in other EU private law doctrines and institutions within this phenomenon, whether related to traditional private law fields,[78] modes of transnational private regulation,[79] and dispute resolution.[80] As discussed in section II and as the epigraph of Hart and Sacks highlights, this emphasis on the integral place and role of private law and ubiquitous modes of private ordering by civil society institutions has also been one of the marks of the jurisprudence of process tradition since its original formulation.

Yet the socio-legal purview of the jurisprudence of process on legal sources and its insights regarding the constitutive place of law also signal its critical pedigree for the study of EU private law and its constitutive role within foreign or global market relations and orders. Beyond the seeming naturalisation of global market forces underpinning the configuration of the 'Brussels effect', which depicts transnational corporations and regulatory dynamics as merely driven by these forces, from this insight and purview the jurisprudence of process rather underscores how the purportedly spontaneous orderings of markets are legally constituted as well as the pivotal role that private law doctrines and institutions play in this respect. Market orderings are thus premised upon private law institutions and the socio-political practices underpinning them.[81] In highlighting the institutional nature and thus constitutive

[77] See, eg, M Cremona and HW Micklitz (eds), *Private Law in the External Relations of the EU* (Oxford, Oxford University Press, 2016); L de Almeida, M Cantero, and HW Micklitz, 'Institutional and Normative Co-operation in Private Law: Beyond the Hague Conference towards Standard Setting Organizations' in RA Wessel, J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Cheltenham, Edward Elgar Publishing, 2019); and Cantero and Micklitz (n 45). For a broader account of the relationship of the present volume to the overall FiDiPro agenda and publications, see the introductory chapter by A Beckers, HW Micklitz, R Vallejo, and P Letto-Vanamo in this book.

[78] P Franzina, *The External Dimension of EU Private International Law After Opinion 1/13* (Cambridge, Intersentia, 2017).

[79] M Avbelj, *The European Union under Transnational Law: A Pluralist Appraisal* (London, Bloomsbury Publishing, 2018).

[80] JRM Dona and N Lavranos (eds), *International Arbitration and EU Law* (Cheltenham, Edward Elgar Publishing, 2021); and K von Papp, *EU Law and International Arbitration: Managing Distrust Through Dialogue* (London, Bloomsbury Publishing, 2021). See also, within the specific domain of investment disputes or energy law, C Baltag and A Stanič (eds), *The Future of Investment Treaty Arbitration in the EU: Substance, Process and Policy* (Alphen aan den Rijn, Kluwer Law International BV, 2020); J Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (Oxfordshire, Routledge, 2020); and MD Boeck, *EU Law and International Investment Arbitration: The Compatibility of ISDS in Bilateral Investment Treaties (BITs) and the Energy Charter Treaty (ECT) with the Autonomy of EU Law* (Leiden, Brill, 2022).

[81] K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, Princeton University Press, 2019); S Deakin, D Gindis, GM Hodgson, K Huang and K Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 *Journal of Comparative Economics* 188; ATF Lang, 'The Legal Construction of Economic Rationalities?' (2013) 40 *Journal of Law and Society* 155.

role of law is where the jurisprudence of process tradition meets old and contemporary insights on law and political economy.[82]

The way these private law institutions are conceived and designed thereby have the capacity to shape and eventually transform the power dynamics among participants in markets orders as well as the overall socio-political practices underpinning these orders within and beyond the EU.[83] Several chapters within the present volume highlight this constitutive potential of EU private law (including the chapters by Ulfbeck, chapter 13 and that by Salminen, Rajavuori, and Eller in chapter 14), yet others problematise it for different reasons (such as the chapters by Chadwick, chapter nine and Möschel, chapter seven). Alongside the transition from an 'international relations' paradigm to a 'transnational relations' paradigm, this signals the need to trace and critically reflect upon the constitutive roles of EU private law in making these market forces and shaping market relations beyond the EU. This entails configuring a research agenda on European transnational private law informed by insights from constructivism and international political economy that can thereby be seen as a continuation of the jurisprudence of process tradition within the contemporary landscapes of post-national law and policy.[84]

B. Analytically – A Renewed Taxonomy of the Foreign Reach of EU Private Law

The second way in which the notion of European transnational legal processes contributes to ongoing studies on the foreign reach of European private law is by widening and deepening our understanding of the different modalities through which EU law is travelling abroad. The specialised literature has used different angles to map and

[82] P Zumbansen, 'Economic Law: Anatomy and Crisis' (2021) 1 *Journal of Law and Political Economy* 462; 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, Cambridge University Press, 2020); and J Britton-Purdy, DS Grewal, A Kapczynski, and KS Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2019) 129 *Yale Law Journal* 1784. See also, for their relationship with earlier institutional accounts of law, B Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Harvard, Harvard University Press, 1998).

[83] Among other private law institutions, see, eg, R Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge, Cambridge University Press, 2021); AC Cutler and T Dietz (eds), *The Politics of Private Transnational Governance by Contract* (London, Routledge, 2017); and D Danielsen, 'Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law is Needed to Address Global Inequality and Economic Development' in U Mattei and JD Haskell (eds), *Research Handbook on Political Economy and Law* (Cheltenham, Edward Elgar Publishing, 2015) 195–204. See also, in general, RM Unger, *What Should Legal Analysis Become?* (Paris, Verso, 1996); and A Beckers, KH Eller and PF Kjaer, 'The Transformative Law of Political Economy in Europe' (2022) 1 *European Law Open* 749: explaining that 'micro actions need to be systematically linked to a concept of society, its overall level of coherency, and institutional dynamics' and how 'this link is provided by legal institutions understood as meso-level formations linking micro and macro. […] A transformative law of political economy ought to look at the most central institutions that constitute, with legal and political means, a particular economic system and its distributive patterns'.

[84] In this vein, see Calliess and Zumbansen (n 20) chapter 2, 111: expounding why and how 'transnational law regimes … are characterised by a combination and, in fact, inseparability of coordinative ("private") and regulatory ("public") dimensions in the *substantive* dimension of law'.

characterise these diverse modes of EU law's foreign diffusion. These angles largely correspond with the traditional focus of their respective disciplinary camp. Political scientists, for instance, have generally focused on the mode of power involved. This had led to an ongoing debate within political science literature on the phenomenon driven by concurrent representations of the modes of power informing the foreign reach of EU law and policies, whether this power is represented in ethical, economic, or epistemic terms.[85] In line with one of the cornerstones of process jurisprudence, however, the importance has been stressed of paying due attention within this debate to context instead of relying on a single perspective to explain the source of power that is driving the application of EU law and policy abroad.[86]

Building upon the anthropomorphic assumptions of the legal discipline, legal scholars have rather tended to focus on the modes of agency involved. As reviewed above, a key taxonomy in these respects has been whether EU law is achieving a foreign reach through unilateral, bilateral, or multilateral means, depending on whether the EU requires the consent of one or more representatives to extend its laws abroad. This agency-based characterisation by legal scholars of the foreign reach of EU law is implicitly supplemented with a spatial representation of the different planes in which these modes of foreign reach proceed. The key parameters here are whether this foreign reach proceeds in a horizontal plane towards foreign states and regional institutions or in a vertical plane towards international or global governance institutions broadly conceived.

As this section elaborates, the process approach and transnational paradigm underpinning the notion of European transnational private law enables us to widen our perspectives on and understanding of the foreign reach of EU law in at least four specific ways. The first way is that it enables us to distil some intricacies between the *de facto* Brussels effect advanced by Bradford and the categories of 'extraterritoriality' and 'territorial extension' advanced by Scott as different unilateral means for the foreign reach of EU law. Distilling these intricacies enables us to thematise a key legal question for the external reach of EU law: could and should the EU be held accountable and eventually responsible for the impacts of its laws abroad through the *de facto* Brussels effect?

The second way is that the socio-legal purview of sources informing the jurisprudence of process enables us to expand the range of bilateral means through which the EU is travelling abroad. According to this broader conception of sources, these bilateral means would also encompass ubiquitous modes of technocratic outreach by EU governmental or administrative authorities that are significantly shaping market orderings and private relations abroad through soft law or even less formalised modes of policy cooperation in several socio-economic sectors, as chapter three by Hans-W Micklitz on regulated industries powerfully illustrates.

[85] See I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235; C Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' (2015) 22 *Journal of European Public Policy* 1336; and M Young and P Ravinet, 'Knowledge Power Europe' (2022) 44 *Journal of European Integration* 979.

[86] AR Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 *Journal of European Public Policy* 1233.

The third analytical contribution that the notion of European transnational legal processes makes is to refine the understanding of the multilateral channels through which it is travelling abroad. As this section elaborates, this requires supplementing the 'vertical' account taken by most specialised studies on the foreign reach of EU law with a 'diagonal' account of the EU's foreign legal dissemination through international or global governance institutions.

Fourthly and finally, the triad account of the agency-based model is also relevant for what it conceals. Drawing upon the conceptual transition from an international to a transnational paradigm of foreign relations informing our proposed framework to study European transnational legal processes, two renewed modes of foreign reach are advanced: societal modes of foreign reach through private ordering or private regulation, and collateral modes of foreign reach through comparative legal transplants and processes of legal convergence.

On those bases, this section proposes a renewed taxonomy for the systematic study of the foreign reach of EU law. This taxonomy includes five distinctive means. Building upon the agency-based categorisation advanced by Bradford and Scott, those means are:

1) unilateral means of foreign reach through 'extraterritoriality', 'territorial extension', or the *de facto* Brussels effect;
2) bilateral means of foreign reach through treaties or other agreements between the EU and foreign countries or groups of countries;
3) multilateral means of foreign reach through international or global governance institutions;
4) societal means of foreign reach through non-state actors and private ordering; and
5) collateral means of foreign reach through legal transplants and processes of legal convergence.

Alongside this taxonomy, this section elaborates on each of the insights related to European transnational legal processes outlined above. It also highlights their special relevance from the perspective of private law with reference to some of the chapters in this volume and broader studies on the foreign reach of EU law as a basis for future development of the research agenda on European transnational private law.

i. Foreign Reach of EU Private Law Through Unilateral Modes

The unilateral means for the foreign reach of EU private law generally includes mechanisms of 'extraterritoriality', 'territorial extension', as well as the '*de facto* Brussels effect' respectively advanced by Scott and Bradford. In contrast to the factual basis of the Brussels effect, the hypotheses of 'extraterritoriality' and 'territorial extension' advanced by Scott are indeed two diverse legislative techniques that the EU uses to extend its laws abroad. The former entails applying EU law to persons or circumstances with no connection to EU territory, such as its nationality-based jurisdiction over human trafficking offenders established by the Human Trafficking Directive (2011) or its effects-based jurisdiction over certain derivatives transactions as established by

the European Market Infrastructure Regulation (2012).[87] The hypothesis of 'territorial extension' in turn conveys situations where there is some initial connection to EU territory, which at the same time triggers application of EU law to foreign conduct, persons, or legal systems. As Scott explains, while hypotheses of extraterritoriality in EU law are the exception, those of 'territorial extension' are ubiquitous across several fields of EU law and usually operate on a 'transaction-level', 'firm-level', or 'country-level' basis, or through some combination of these.[88] As explained above, they are all unilateral because none of these mechanisms requires the acquiescence or consent of the foreign country or region for application of EU law within their territories.

From the perspective of private law, it is important nevertheless to stress that this triad of unilateral means is one of the key sources for the study of European transnational private law because it analytically represents different instances through which EU law is shaping private relations or market orders abroad via intervening in the configuration of core private law institutions.[89] In the case of what Scott categorises as 'extraterritoriality', a good illustration is the 'bonus cap' introduced by the Prudential Supervision Directive (2013) for managers of credit institutions and financial investment firms, including their foreign subsidiaries, thereby impacting on issues of foreign corporate governance, labour law, and financial regulation.[90] In the case of 'territorial extension', a vivid illustration is the extensive corporate governance and operational requirements that the Ship Inspection Regulation (2009) imposes on 'recognised [private] organisations' in order to perform these inspections on behalf of the EU, which 'encompass all legal entities that contribute to ensuring that the organisation in question provides cover for their services worldwide'. It also encompasses widespread techniques in several domains of EU private law where access to the EU market for foreign services or products is made conditional on recognition of the equivalence of foreign laws in terms of their capacity to ensure compliance with certain production or commercialisation processes.[91] Finally, in

[87] See Art 10(1) of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Human Trafficking Directive) [2011] OJ 101/1; and Arts 4(l)(a)(iv) and 11(4) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (European Market Infrastructure Regulation) [2012] OJ L201/1. For a discussion of these and other examples, see Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 3) 94–96; and J Scott, 'The Global Reach of EU Law' in Cremona and Scott (eds) (n 15) 23–24.

[88] For a survey and analysis of these cases, see Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 3), 96–123; and Scott (n 87) 24–29.

[89] On the notion of private law and its different conceptions that are driving our study of European Transnational Private Law, see chapter 2 by A Beckers in this volume.

[90] See Arts 92 and 94 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (Prudential Supervision Directive) [2013] OJ L176/338 discussed by Scott (n 87) 23.

[91] See Arts 2(c) and 4(3) of Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations (Ship Inspection Regulation) [2009] OJ L131/11 and some of the examples of this recognition of equivalence technique discussed by Scott (87) 25–28. On the use of mutual recognition as a modified mode of 'extraterritoriality' or 'territorial extension' within the field of EU financial law, with ample discussion of the EU and US positions and interactions in these respects, see P Davies, 'Financial Stability and the Global

the case of the '*de facto* Brussels effect', a good illustration is how EU approaches to consumer health and safety in the fields of food and chemicals are disciplining related production or commercialisation processes in several foreign countries or regions.[92] Thus, as analytically different modes of foreign EU legal unilateralism, 'extraterritoriality', 'territorial extension', and the '*de facto* Brussels effect' all represent an integral part of the phenomenon that the notion of European transnational private law signifies.

Yet one key question is whether and, if so, how these different unilateral means for the foreign reach of EU law are related, as well as why this is relevant. Anu Bradford has stressed the importance of categorically distinguishing the *de facto* Brussels effect from the hypothesis of 'extraterritoriality' and 'territorial extension' advanced by Joanne Scott. This is because only under 'extraterritoriality' and 'territorial extension' would the EU be directly or intentionally applying its laws to foreign countries or regions.[93] These hypotheses of 'extraterritoriality' and 'territorial extension' thus convey an active and deliberate imposition of its norms by the EU over subjects abroad through these legislative techniques as if they were within its own borders or territory. In contrast, according to Bradford the *de facto* Brussels effect would signify a merely involuntary or unintended application of EU law abroad driven by impersonal market forces.[94] This lack of agency would therefore undermine if not exclude any mode of legal responsibility or political accountability of the EU for the consequences of the Brussels effect.

Drawing upon insights from the jurisprudence of process, I would like to raise some qualifications to Bradford's distinction between purportedly intentional (that is, 'extraterritoriality' and 'territorial extension') and unintentional ('the *de facto* Brussels effect') manifestations of EU legal unilateralism, as a way of showing what the notion of European transnational private law inspired by this tradition adds to the discussion. One can qualify this distinction between intentional and unintentional modes of the unilateral outreach of EU law in at least two ways. The first way is by showing how 'territorial extension' and the *de facto* Brussels effect can be conjoined rather than necessarily standing apart. As recently advanced by Scott, the category of 'legal non-divisibility' as a condition for the operation of the Brussels effect is an ambivalent category that overlooks the extent to which this is deliberately generated by the EU legislator through 'territorial extension' techniques, whether in its

Influence of EU Law' in Cremona and Scott (eds) (n 15). See also, for a specialised study of these techniques in the field of environmental law, Hadjiyianni (n 4).

[92] For a review of these cases, see Bradford (n 1) chapter 6.

[93] Bradford (n 1) 67–68: '… the Brussels Effect is not the only manifestation of the EU's unilateral influence. The EU also exerts unilateral influence over foreign actors through legislative techniques such as extraterritoriality or territorial extension. Through these instruments, the EU seeks to directly apply its own regulations to foreign actors. These techniques are distinct from the market-driven harmonization associated with the Brussels Effect … As a threshold matter, the Brussels Effect should be distinguished from these other unilateral mechanisms of influence.'

[94] See, eg, Bradford (n 1) 6: noting that the *de facto* Brussels effect explains how 'unilateral regulatory globalization occurs when the law of one jurisdiction migrates into another in the absence of the former actively imposing it or the latter willingly adopting it'; and xiv explaining that different from many other forms of global influence, through the Brussels effect 'the EU does not need to impose its standards coercively on anyone – market forces alone are often sufficient to convert the EU standard into the global standard as companies voluntarily extend the EU rule to govern their worldwide operations'.

'firm-level' or country-level' varieties. To the extent that the category of legal non-divisibility 'fails to capture the "legislated" as opposed to the contingent nature of this phenomenon', its presence will 'often reflect a choice that the EU legislature has made … embodied in the substance of EU law'. For these reasons, Scott concludes, through these pervasive modes of 'territorial extension' that 'the EU may be viewed as taking an active step to ensure that the conditions for the emergence of the Brussels Effect are met'.[95] This is a sharp point, which nevertheless implicitly insulates the EU against any contestation for the operation of the Brussels effect in any other hypothesis.

Yet my second qualification comes from Bradford's own findings. Even if one may regard the *de facto* Brussels effect as an unintentional mode of the unilateral legal outreach of EU law beyond those cases of deliberate legal non-divisibility highlighted by Scott, nevertheless – as highlighted by Bradford – the EU has become increasingly aware of this foreign reach of EU law through the Brussels effect.[96] There is thus a growing degree of consciousness within and beyond EU institutions of the significant political power that the EU unilaterally exerts over several socio-economic realms beyond its frontiers through the *de facto* Brussels effect.[97] Given that one of the insights of the legal process tradition is how socio-political power and authority usually stand in a dialectical relationship that is utterly carried and institutionalised through law, one could thus expect that the growing awareness of this 'unique, and highly penetrating power to unilaterally transform global markets' currently wielded by the EU is or will become legally shaped through an evolving European transnational private law that may come to assert renewed conditions for its valid and legitimate exercise. The doctrinal category of 'complicity' recently advanced by Joanne Scott to assess the EU's responsibility for the impacts of its foreign policies or the category of 'network responsibility' recently advanced by Rónán Condon could be understood in this line.[98]

ii. Foreign Reach of EU Private Law Through Bilateral Modes

This conveys situations where EU law travels as a result of different types of international agreements between the EU and foreign states or regions. These agreements

[95] Scott (n 87) 31–35.

[96] This growing awareness has been illustratively documented by Bradford through the review of several statements from EU institutions related to diverse legislative instruments and regulatory programmes, which indicates 2007 as a turning point with the publication of the Commission's working paper on 'The External Dimension of the Single Market Review'. See Bradford (n 1) 18–24: noting how 'In its early decades – beginning in the 1960s but continuing well into the 2000s – the EU's external influence can thus best be viewed as an incidental by-product of its internal motivations. However, more recently, a conscious external agenda has emerged to complement the EU's internal regulatory agenda.'

[97] As Anu Bradford stresses, through the Brussels effect 'the EU wields significant, unique, and highly penetrating power to unilaterally transform global markets'. This is relevant because in a world where 'it is increasingly difficult to exert raw military power or even rely on economic sanctions or conditional incentives embedded in trade or loan agreements … regulatory power is one of the few areas where unilateralism still works.' Bradford (n 1) xiv, xvi.

[98] See Scott (n 87) 41–63; and R Condon, *Network Responsibility: European Tort Law and the Society of Networks* (Cambridge, Cambridge University Press, 2022).

can be general international treaties, such as the salient Accession, Partnership, or Preferential Trade Agreements that the EU has established with several foreign countries or regions, which usually include provisions that shape private relations in several socio-economic domains. It can also be specific agreements of a sectoral nature, such as the Energy Community Treaty, the Treaty Establishing the Transport Community, the EU External Aviation Policy, or Sustainable Fishing Partnership Agreements, which require foreign countries or regions to apply parts of the EU acquis in a given regulatory domain.[99] Yet it can also be less formalised modes of technocratic outreach or other modes of policy co-operation that EU administrative authorities regularly exercise within several domains through trans-governmental networks beyond traditional diplomatic channels, whether for reciprocal collaboration in policy matters, capacity-building, or provision of technical assistance concerning legal developments or enforcement. For the purposes of our study, all these avenues are regarded as bilateral means for the foreign reach of EU law because in all these cases the potential application of EU law abroad requires at least some degree of formal (not necessarily to imply less asymmetrical) consent or at least willingness on the part of the foreign country or region to implement EU law as part of a broader collaboration scheme with the EU.

To the extent that through this range of bilateral means the EU is shaping foreign private relations and market orders with a focus on core private law institutions, they also represent a key source for the study of European transnational private law. The most vivid illustration comes from Accession Treaties, which usually entail complete application of the *acquis communautaire* to countries that are joining the EU, thereby impacting most of their private relations and market orderings that fall within EU spheres of competence.[100] From its six original Member States, the series of accession treaties has enabled the EU to currently extend the 'visible hand' of EU private law to 27 European countries.[101] Moreover, as part of the ongoing 'enlargement strategy', which requires a transition period where prospective Member States need to show their capacity to integrate EU law within their own territories, several domains of EU private law are gradually permeating the orders of several non-EU candidates, such as Albania, Montenegro, Serbia, Turkey, and Ukraine, or prospective candidates, such as Georgia or Kosovo.[102] Accession Treaties have thus been one of the most prominent avenues for the bilateral extension of EU law within the European continent and with potential inroads into Asia (for example, Turkey and Georgia).

[99] See 'The Energy Community Treaty', available at https://eur-lex.europa.eu/EN/legal-content/summary/the-energy-community-treaty.html; 'The Treaty Establishing the Transport Community', available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A1027(01)&rid=1; several legal materials comprising the EU 'External Aviation Policy', available at https://transport.ec.europa.eu/transport-modes/air/international-aviation/external-aviation-policy_en; and on the 'Sustainable Fishing Partnership Agreements', available at https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en.

[100] On the significance of these EU private law impacts with respect to the private law orders of its Member States, see HW Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press, 2018).

[101] For a chronological list of Accession Treaties, see 'Accession Treaties', available at https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-accession.html.

[102] See EU 'Enlargement Strategy', available at https://commission.europa.eu/strategy-and-policy/policies/eu-enlargement_en.

Yet other types of international treaties have also had a notable place for the extension of parts of EU private law within and beyond the European continent. One manifestation has been prominent modes of economic partnership, association agreements, and bilateral trade agreements that the EU has subscribed to with several foreign countries or regions (including countries as diverse as Israel, Mozambique, Japan, Morocco, and the Palestinian Authority) as well as key strategic countries or regions, such as Canada (Comprehensive Economic and Trade Agreement), Singapore, Australia, India, Mercosur, and the UK. In addition, the EU has subscribed to similar agreements of a diverse nature, such as 'customs unions' (Andorra, Turkey), or 'global agreements' (Mexico). Particularly relevant among these are agreements that the EU has subscribed to with non-EU border countries with the aim of enhancing European stability and prosperity, whether under the Agreement on the European Economic Area (Iceland, Liechtenstein, and Norway) or the European Neighbourhood Policy.[103] In diverse ways and with different emphases, through all of these agreements the EU has been either exporting parts of its rules or principles concerning internal market disciplines and relations abroad or gradually pursuing some degree of convergence towards EU law.[104] As chapter 11 by Mataija further elaborates, this makes these agreements one of the main avenues for the external reach of EU law and places the EU in a relative position of authority regarding modes of regulatory remote control of processes of production and commercialisation beyond its frontiers.[105]

A second manifestation appears in less salient agreements yet equally relevant mechanisms for the bilateral export of EU rules and market disciplines. These are different types of sectoral agreements that the EU has subscribed to with several foreign countries or regions concerning specific socio-economic domains. They are relevant from the perspective of private law because they involve a significant degree of transposition of or convergence towards EU norms and principles regarding certain specific markets. Prominent examples are the Energy Community Treaty,[106] the Treaty establishing the Transport Community,[107] and Sustainable Fishing Partnership Agreements.[108]

A related yet different bilateral way through which EU law is travelling abroad is through varied transgovernmental networks of policymakers and other regulatory officials or stakeholders. This is related because this range of epistemic communities usually also operates in specific legal fields or regulated markets. But it is different

[103] European Commission, 'European Neighbourhood Policy', available at https://commission.europa.eu/strategy-and-policy/policies/european-neighbourhood-policy_en.

[104] For different perspectives into this theme, see D Bouris and T Schumacher (eds), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy* (Berlin, Springer, 2016); S Poli, *The European Neighbourhood Policy – Values and Principles* (Oxfordshire, Routledge, 2016); and D Schade, *The EU in Association Agreement Negotiations: Challenges to Complex Policy Coordination* (Oxfordshire, Routledge, 2019). See also, S Gstöhl and S Schunz, *Theorizing the European Neighbourhood Policy* (Oxfordshire, Taylor & Francis, 2016).

[105] On this regulatory technique, see also P Mertenskotter and RB Stewart, 'Remote Control: Treaty Requirements for Regulatory Procedures' (2018) 104 *Cornell Law Review* 165.

[106] 'Energy Community,' available at www.energy-community.org/aboutus/whoweare.html.

[107] 'Transport Community,' available at www.transport-community.org/about-us/.

[108] European Commission, 'Sustainable Fishing Partnership Agreements,' available at https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en.

because these modes of transfer do not happen through formal, bilateral agreements, but usually through less formalised instruments such as codes of conduct, guidelines, or memorandums of understanding, as well as unofficial conventions or practices among officials. Within the jurisprudence of process framework, these types of instruments and practices do have an established place as pertinent sources of analysis due to their contextual and socio-legal relevance. Typically this foreign reach of EU law proceeds as part of reciprocal collaboration between EU governmental or administrative officials on certain policy matters, including provision of technical assistance concerning regulatory rulemaking or enforcement, as well as capacity-building.[109] The specialised study by Micklitz highlights part of this phenomenon concerning regulated industries, yet other studies on the external dimension of EU law have stressed their prominent role in the external dimension of EU competition law[110] and controversial migration agreements between the EU and some border countries or regions.[111]

iii. Foreign Reach of EU Private Law Through Multilateral Modes

This conveys situations where EU law travels to foreign countries or regions of the world through international or global governance institutions. These institutions comprise classic international actors, such as international organisations or international courts and tribunals. They also include a range of other entities that do not necessarily fit within the doctrine of sources of international law but play a prominent role in the development of international law and policy on issues of private law beyond the state. These are usually signified by the broader category of global governance institutions. These global governance institutions include institutionalised networks of policymakers that are non-treaty based, such as the Basel Committee on Banking Supervision or the International Organization of Securities Commission (IOSCO), as well as hybrid (public-private) organisations, such as the Codex Alimentarius Commission or the Internet Corporation for Assigned Names and Numbers (ICANN). These are all multilateral because they involve resolving issues or advancing positions among three or more constituents in a governance dynamic that also encompasses the interests and pedigree of the multilateral institution itself beyond those of their respective constituents or stakeholders.

As noted previously, the relationship between EU law and global governance institutions as well as the place and role of the EU as an international legal actor are themes that have been widely analysed in EU legal scholarship. These themes have been taken up by the specialised literature on the foreign reach of EU law to characterise this foreign reach through multilateral means as one largely defined by instances where the EU participates in international forums or collaborates with global governance institutions for the implementation and dissemination of international

[109] For a specialised study on these technocratic modes of foreign reach of EU law, see S Lavenex, 'The Power of Functionalist Extension: How EU Rules Travel' (2014) 21 *Journal of European Public Policy* 885.

[110] G Monti, 'The Global Reach of EU Competition Law' in Cremona and Scott (eds) (n 15).

[111] B Ryan, 'The Migration Crisis and the European Union Border Regime' in Cremona and Scott (eds) (n 15).

norms within or beyond the EU. An illustrative example is the account provided by Cremona and Scott where discussion of this multilateral means is largely circumscribed by the participation of the EU in international fora and how in its external dimension the EU acts in 'support of the adoption and application of international law'.[112] The relationship is thus generally limited to the EU and international institutions in a vertical plane, where the EU would either perform as an originator for the development or as an agent for the global dissemination of international law. A similar approach to this multilateral means is followed by Bradford.[113] This is a means where the influence of the international relations paradigm *vis-à-vis* the transnational relations paradigm is thus most visible.[114]

Yet this characterisation can be misleading for two main reasons. One is that it may include instances where the EU is the agent rather than the principal concerning certain international or foreign (rather than strictly European) legal developments, as some of the previous references indicate. This would entail analytically muddling the external dimension of EU law as a distinctive phenomenon with instances where the EU is merely performing as an agent of international or global governance institutions in implementing or disseminating their norms. One example comes from the field of accounting standards, where the early embrace of International Financial Reporting Standards (IFRS) by the EU and its ultimate dissemination throughout the world can relate to a distinctive US influence in the institutional and procedural design of the International Financial Reporting Standards Foundation.[115] Another example comes from chapter seven by Möschel in this volume that illustrates this when warning that any perceived global reach of EU non-discrimination law may in fact be the globalisation of a US construct by the EU. In other words, to the extent that EU non-discrimination law is exported to foreign countries or regions, the EU would not be the principal but a mere agent in these transnational legal processes.[116]

The second reason why this characterisation can be misleading is that tracing the vertical relationships between the EU and global governance institutions is only half the story. If one wants to study the foreign reach of EU law through multilateral means, one would need to trace not only the extent to which EU law or regulatory positions were uploaded to global governance institutions. One also needs to trace the extent to which these EU positions were then downloaded or disseminated to foreign countries or regions by these global governance institutions or other actors within those transnational legal processes. Rather than spatially 'vertical,' this sequential upload/download movement reveals that this means of foreign reach is better conceived as 'diagonal' given that EU law is attaining a foreign reach *through*

[112] Cremona and Scott, 'Introduction – EU Law Beyond EU Borders' (n 15) 1–3.

[113] See, eg, Bradford (n 1) 12, 72–74.

[114] For an overview of these multilateral channels, see the thorough study by M Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Cremona and Scott (eds) (n 15).

[115] S Botzem, *The Politics of Accounting Regulation: Organizing Transnational Standard Setting in Financial Reporting* (Cheltenham, Edward Elgar Publishing, 2012); and K Camfferman and SA Zeff, *Financial Reporting and Global Capital Markets: A History of the International Accounting Standards Committee, 1973–2000* (Oxford, Oxford University Press, 2007).

[116] For a more differentiated account of the external dimension of EU non-discrimination law, see Giegerich (n 4) pt IV.

multilateral institutions located at the international or global governance level. It is under these sequential upload/download movements that one can thus fully grasp whether and to what extent EU private law is indeed shaping markets or other socio-economic realms within foreign countries or regions *through* multilateral institutions, which chapter 10 by Macacci in this volume highlights concerning the foreign reach of EU financial law through IOSCO.[117]

iv. Foreign Reach of EU Private Law Through Societal Modes

The three previous categories build upon the agency-based model that is well established in the literature on the foreign reach of EU law and the international relations paradigm that largely underpins it. Yet the transition from an international towards a transnational relations paradigm informing the project of a European transnational private law suggests the relevance of thematising at least two additional means for this foreign reach. One of them is the foreign reach of EU law through societal means, which conveys situations where EU law travels to foreign countries or regions of the world through private actors or civil society institutions.

The role of private actors as agents of EU foreign legal dissemination is not new within the specialised literature. For instance, Bradford ascribes a central place and role to transnational corporations operating in the EU as transporters of EU law to foreign countries or regions and thereby accomplishing a *de facto* and potentially also the *de jure* Brussels effect.[118] Scott also underscores the important place that corporate groups with some territorial link to Europe occupy as a mechanism for triggering the 'firm-level territorial extension' of EU law to their worldwide operations.[119] Furthermore, Cremona and Scott also mention some instances where the EU draws upon other legal capacities of non-state actors to export its rules, such as maritime classification societies.[120] Therefore, private actors and civil society institutions already form an integral part of the landscape of the foreign reach of EU law.

What does the transnational relations paradigm informing European transnational private law add to this landscape? In the case of Cremona and Scott these references to the role of private actors and civil society institutions as mechanisms for extending 'EU law beyond EU borders' are largely marginal or anecdotal. This contrasts with the prominent role that private actors and civil society institutions play in different realms of contemporary socio-economic governance that the transnational relation paradigm highlights.[121] For these reasons, from a transnational private

[117] In a similar vein concerning the external dimension of EU financial law *through* global governance institutions, see M De Bellis, 'Reinforcing EU Financial Bodies' Participation in Global Networks: Addressing Legitimacy Gaps?' in Hofmann, Vos and Chamon (n 4).

[118] Bradford (n 1) xv: underscoring from the outset how the Brussels effect 'demonstrates that the EU's greatest global influence may not be through multilateral mechanisms and political institutions, but instead through unilateral actions, facilitated by markets and private corporations'.

[119] Scott (n 87) 25–26; and Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 3) 107.

[120] Cremona and Scott, 'Introduction – EU Law Beyond EU Borders' (n 15) 13–14.

[121] P Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13 *German Law Journal* 1269; F Cafaggi, 'Transnational Private Regulation: Regulating Global Private Regulators' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Cheltenham, Edward Elgar Publishing, 2016); P Paiement, *Transnational Sustainability Laws* (Cambridge, Cambridge University Press, 2017).

law perspective one can posit that this role of private actors and civil society institutions is worth being thematised as a distinctive means or mechanism of EU foreign legal dissemination.

But how should the role of private actors and civil society institutions be thematised? Scott largely circumscribes the analysis to one structure of private action: more/fewer hierarchical structures represented by single organisations or corporate groups. But this is not the only possible structure of private action. In addition to hierarchies, the societal means category also includes modes of private action structured as markets, as in widespread instances of regulatory competition for the regulation of transnational markets (think of the current regulatory race among several organisations to standardise the notion of 'green investments'),[122] as well as networks, as in the ubiquitous modes of contractual networks that form widespread global supply chains in several industries.[123]

Furthermore, while Bradford largely circumscribes the role of private actors as mere carriers or ruletakers of EU law, whether in their *de facto* application to their foreign production or commercialisation processes or their *de jure* dissemination within foreign regions, this overlooks how this may also involve a significant rule-making dimension. In other words, the engagement of EU law with private actors and civil society institutions as agents for their foreign legal dissemination can have a relevant *jurigenerative* aspect that is worthy of distinctive attention. It is this 'dark private legal space' that this chapter wishes to bring into the spotlight for analysis and scrutiny in the study of European transnational private law through the notion of its foreign reach through societal means.[124]

Within the present volume, one prominent example comes from chapter 14 by Salminen, Rajavuori, and Eller. In analysing how the EU draws upon value chains to extend its laws abroad, the chapter eloquently identifies three waves of EU legislation and regulation in these respects. These waves largely correspond with unilateral and bilateral modalities of the external reach of EU law, yet, as the chapter also highlights, a crucial societal dimension is also operating in parallel that needs to be understood and assessed. How are these policy mandates being implemented by lead firms and other civil society actors within these supply chains? What types of instruments and mechanisms are they using and why are they using them? And with what implications and potential for reform or contestation? These are some of the questions that the 'dark space' of societal private law suggests.

[122] See, eg, H Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (London, Bloomsbury Publishing, 2013); and JM Smits, 'A Radical View of Legal Pluralism' in L Niglia (ed), *Pluralism and European Private Law* (London, Bloomsbury Publishing, 2013).

[123] A Beckers, 'The Invisible Networks of Global Production: Re-Imagining the Global Value Chain in Legal Research' (2020) 16 *European Review of Contract Law* 95; KH Eller, 'Private Governance of Global Value Chains From Within: Lessons From and For Transnational Law' (2017) *Transnational Legal Theory* 1; M Amstutz, 'Contract Collisions: An Evolutionary Perspective on Contractual Networks' (2013) 76 *Law and Contemporary Problems* 169; and G Teubner, *Networks as Connected Contracts* (London, Bloomsbury Publishing, 2011). See also, in general, K Ladeur, 'Towards a Legal Theory of Supranationality – The Viability of the Network Concept' (1997) 3 *European Law Journal* 33.

[124] A Beckers, 'EU Law's Dark Private Legal Space: Researching Private Regulators and the Importance of Legal Doctrine' (2022) 18 *European Constitutional Law Review* 657.

A similar phenomenon is captured in chapter 13 by Ulfbeck from a different angle. As Ulfbeck discusses, we seem to be at a hinge moment within European tort law that is increasingly evolving to instil due diligence duties for several types of commercial actors who are expected to disseminate them throughout their supply chains. While this is already prominent in the realm of lead transnational corporations in global supply chains, a similar transformation is taking shape for banks as part of the EU sustainable finance strategy[125] and digital platforms in the light of the Digital Services Act.[126] To the extent that these private actors are expected to implement policy mandates through rulemaking, monitoring, and enforcement activities throughout their supply chains or spheres of competence, these represent prominent societal means through which EU law is attaining an external dimension through an emerging 'private administrative law'.[127]

These modes of foreign reach are also neither 'vertical' nor 'horizontal,' but operate 'diagonally'. Yet this 'diagonal' means does not proceed 'upwards' *through* multilateral institutions as recently discussed. It is a diagonal that rather proceeds 'downwards' through private actors or civil society institutions that are fulfilling a key role in the foreign dissemination of EU law through co-regulatory practices in ways that neither Bradford nor Scott properly capture. Apart from the several examples drawn from the different chapters of this volume referenced above, another example is the case of the Society for Worldwide Interstate Financial Telecommunications (SWIFT), which occupies a key place and role for the fulfilment of contractual obligations and the overall operation of the transnational financial system.[128]

v. Foreign Reach of EU Private Law Through Collateral Modes

The second renewed means for the extension of EU law beyond its frontiers consists of cases where a foreign country or region decides to formally integrate EU law within their own legal system. This can be because this foreign country or region directly adopts or applies an EU norm or institution – an instance to be thematised as a case of 'legal transplant'. It can also be because a foreign country or region decides to emulate or approximate its laws to those of the EU without directly transposing them – an instance to be thematised as a case of 'legal convergence'. Whether operating through legal transplants or convergence, these means for the foreign reach of EU law are conceived as 'collateral' because they require an active role by the competent

[125] European Commission, 'Strategy for Financing the Transition to a Sustainable Economy', available at https://finance.ec.europa.eu/publications/strategy-financing-transition-sustainable-economy_en.

[126] European Commission, 'Digital Services Act', available at https://digital-strategy.ec.europa.eu/en/policies/safer-online.

[127] R Vallejo, 'After Governance? The Idea of a Private Administrative Law' in Kjaer (n 82).

[128] SWIFT has been in the spotlight lately due to its key role in implementing international sanctions against Russia in the context of the war on Ukraine: see, 'Ukraine: EU Agrees to Exclude Key Russian Banks from SWIFT', available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1484. See also, more broadly, H Farrell and AL Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44 *International Security* 42; and A Nölke, *Capital Claims: Power and Global Finance* (Oxfordshire, Routledge, 2022), chapter 10 on 'Geoeconomic Infrastructures: Building Chinese-Russian Alternatives to SWIFT'.

authorities within the foreign country or region rather than necessarily of the EU itself.

This is not a means of global reach thematised by Scott either in her original essay or in its latest iteration within the edited volume with Cremona. Nevertheless, Scott and Cremona mention several instantiations of it, such as widespread emulation or EU leverage for foreign adoption of the EU model of data protection law.[129] Within the framework of the Brussels effect, this 'collateral' means is explicitly considered by Bradford as part of the so-called 'strict version' of the *de jure* Brussels effect, albeit not studied or thematised.[130] Nevertheless, Bradford reviews several instantiations of this 'collateral' means of foreign legal dissemination, highlighting problematic issues, including how 'the actual effectiveness of the *de jure* Brussels Effect is difficult to measure in precise terms'.[131] Drawing upon the re-flourishing field of comparative law as the twin sister of transnational legal studies, it is my contention that many of these issues can be productively addressed by conceptualising them as foreign reach of EU law by collateral means of 'legal transplants' and processes of 'legal convergence' – broadly conceived.[132]

The literature suggests several ways through which EU law is shaping foreign private relations and market orderings, whether through legal transplants or legal convergence. The chapters in this volume by Beckers (chapter two) and Letto-Vanamo (chapter five), for instance, discuss how 'legal transplants' and more or less official processes of 'legal convergence' were a prominent way through which European private law travelled abroad during the nineteenth century alongside codification movements. Key in these respects are the global dissemination of the 'civil law tradition' and the 'common law tradition' from Europe towards specific countries or regions around the globe.[133]

There are other contributions that nevertheless highlight other collateral modes through which EU private law has been travelling abroad. One is the prominent traction that EU data protection and internet law has been gaining abroad through modes of direct legal transplant or gradual processes of legal convergence.[134] Other studies highlight the transplant of specific rules, such as 'the right to be forgotten' established by the European Court of Justice (ECJ) in *Google Spain*,[135] while other studies rather focus on the transplantation or convergence of key EU legal

[129] Cremona and Scott, 'Introduction – EU Law Beyond EU Borders' (n 15) 5, 9: noting how 'in third countries as the EU acquis is used as a model to incentivise the adoption by third countries of "adequate" data protection laws'.

[130] As Bradford explains, this 'strict version' parallels what David Vogel influentially coined as the 'California Effect' and 'will therefore not be revisited in detail in this book'. Bradford (n 1) 3.

[131] Bradford (n 1) 75–80.

[132] For this broad conception of legal transplants and processes of legal convergence, see M Siems, *Comparative Law*, 3rd edn (Cambridge, Cambridge University Press, 2022) ch 10. On comparative law as the twin-sister of transnational law, see RA Miller and P Zumbansen (eds), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (Oxford, Oxford University Press, 2012).

[133] In this vein, see, in general, P Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th edn (Oxford, Oxford University Press, 2014).

[134] C Kuner, 'The Internet and the Global Reach of EU Law' in Cremona and Scott (eds) (n 15).

[135] A Reich, 'The Impact of the Court of Justice of the European Union on the Israeli Legal System' in A Reich and HW Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford, Oxford University Press, 2020).

institutions abroad.[136] As established concepts in comparative legal studies, the categories of legal transplants and processes of legal convergence transcend the mere institutionalisation of the rule/institution to analyse their functionality and therefore their effectiveness or capacity to adapt or transform after the transplant. In this sense, the notion of legal transplants and processes of legal convergence represents a productive framework to overcome some of the limitations of these collateral modes of EU diffusion outlined above and the strict notion of the Brussels effect in particular.[137]

In sum, as this overview signals, these five means convey distinctive ways through which EU law is travelling abroad. Although they are analytically distinctive, none of these operate in isolation from each other. As Bradford and Scott have thoroughly emphasised, it is key to charting and understanding the way they interact within different socio-economic realms. Several chapters in this volume are also illustrative in these respects. For instance, while the focus of chapter 11 by Mataija is on how the EU is using bilateral means of free trade agreements to exert modes of regulatory remote control over related processes of production and policymaking in foreign regions of the world under the auspices of World Trade Organisation law, it also highlights how – through certain instruments of domestic trade – the EU is also instilling modes of 'co-regulation' and 'territorial extension' to spread its own market disciplines in different sectors, such as fisheries and money-laundering. Likewise, chapter seven by Möschel points to an interplay of 'extraterritoriality', 'legal transplants', and modes of 'co-regulation' as means of enhancing but also hindering adoption of EU non-discrimination law abroad.

This is also one of the key insights of the legal process as a jurisprudential tradition. Given that law is not a set of norms but a process of authoritative decision-making, it is crucial to study the different channels through which legal developments take place. This is because this range of channels provides distinctive insights into when, how, and why these rules matter, as well as the way that perceived interests may be adapted or even transformed alongside this diverse set of transnational interactions. By highlighting five distinctive channels and illustrating them by reference to some of the specialised studies on the foreign reach of EU law both within and beyond this volume, the present chapter thus seeks to offer an analytical point of departure for future studies on European transnational private law.

C. Theoretically – From Abstract Validity and Policy Influence to a Pragmatic Engagement with Institutional Functions, Practices, and their Implications.

The final way in which the notion of a European transnational private law grounded in the jurisprudence of process contributes to ongoing studies on the foreign reach

[136] KJ Alter, 'The Global Spread of European Style International Courts' (2012) 35 *West European Politics* 135–54; KJ Alter, LR Helfer, and O Saldías, 'Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice' (2012) 60 *The American Journal of Comparative Law* 629.

[137] See, in general, TS Goldbach, 'Why Legal Transplants?' (2019) 15 *Annual Review of Law and Social Science* 583; and MM Siems, *Convergence in Shareholder Law* (Cambridge, Cambridge University Press, 2007).

of EU law is by extending the theoretical scope of those studies to other relevant aspects of the phenomenon. This is done by supplementing the prevalent focus on competences of the EU or its Member States concerning external relations matters and charting institutional interactions between the EU and foreign government or global governance institutions in at least three distinct ways. These are as follows:

i. a renewed focus on the purposive functions that these European transnational legal processes perform or are meant to achieve;
ii. how these functions or values are shaped 'in context' by studying concrete institutional practices surrounding them; as well as
iii. their material or cultural implications.

As this sub-section elaborates, each of these additional aspects of analysis are in line with the range of pillars or cornerstones informing the jurisprudence of process outlined in section II and thus would represent an integral part of a research project on European transnational private law sustained upon those basic tenets.

Bradford and Scott address the question of functions in different yet related ways. Beyond a particular discussion in some of the specific case studies, Bradford thematises this question of functions in one of the final chapters that generally discusses the normative desirability or justification of the Brussels effect. The function that EU law purposively seeks to perform beyond its frontiers in this account is correlated with a broad parameter of 'welfare', understood as a combination of social welfare and respect for foreign political autonomy based on rational choice grounds.[138] Scott and Cremona mainly focus on the function of law within European transnational legal processes rather than the function of the processes themselves. Nevertheless, they also highlight some immanent tensions between EU interests and the normative values that are purposively driving these EU legal endeavours beyond its frontiers. I now relate the notion of European transnational private law with each of these themes advanced by Scott and Cremona in tandem.

Regarding the first theme, one of the novel contributions that Scott and Cremona make to the study of the foreign reach of EU law is their systematic account of the enabling and constraining functions that law performs in this respect. There are several manifestations to this. The enabling function is mainly represented by the permissive approach that the Court of Justice of the European Union (CJEU) has taken in several cases regarding the foreign reach of EU law, prompting novel forms of socio-economic or political integration with foreign countries or regions as well as innovative techniques for the enforcement of EU law beyond its frontiers. These include integration through Trade and Association Agreements as well as conditionality or mutual recognition techniques that have channelled complementary agreements with regulatory authorities to ensure compliance with EU law abroad.[139]

[138] Bradford (n 1) ch 8: concluding that 'whether the Brussels Effect is positive or negative depends on individual preferences that vary across policy areas, individuals' socioeconomic and cultural backgrounds, values, and ideologies' yet 'on balance, the Brussels Effect is more likely to generate net benefits that are valuable – even if not uniformly in all instances and for all the people'.

[139] Cremona and Scott, 'Introduction – EU Law Beyond EU Borders' (n 15) 11–14.

The constraining function operates at different levels. While international law as applied by the CJEU has only marginally constrained the EU's foreign reach, EU Law's so-called 'principle of autonomy' has represented a significant hindrance. As Cremona and Scott explain, this principle has constrained the foreign reach of EU law whether through bilateral or multilateral means whenever these international agreements or resolutions jeopardise the decision-making capacities of EU institutions or the primacy of the CJEU in the interpretation of EU law, unless some 'disconnection clause is established'. At the same time, while EU and international human rights constrain the foreign reach of EU law at the procedural and substantive levels, these have rather operated as enabler and driver of this foreign reach as signalled by the active agenda that the EU has pursued to secure European conceptions of the right to privacy in foreign data protection laws or abolition of the death penalty throughout the globe (to which one could add the 'trade and …' turn in international trade law, as stressed in chapter 11 by Mataija).[140] In highlighting how law empowers and at the same time restrains the authority of the EU to regulate relations or practices beyond its frontiers, in line with the jurisprudence of process Cremona and Scott thus show how law shapes and is in many ways constitutive of its 'global regulatory hegemony' (Bradford).

While this constitutive role of EU law can generate much political appeal for those seeking reformist or transformative avenues for change, it is relevant to keep in sight that this constitutive role is usually devised from the perspective of EU law itself and thereby prone to express some ingrained institutional or epistemic biases. The proceduralisation of the external dimension of EU law through institutionalising standards of good governance within these legal processes beyond EU frontiers can certainly help ease some of the biases in making EU authorities more 'responsive', and EU law more 'reflexive' towards the interests of foreign countries or regions. But there are inherent limits or blind spots to that responsiveness or reflexiveness. This is because the decision-making powers still rely on EU authorities that are making those decisions from an EU perspective and are circumstantially subject to the socio-political constraints of a European context. Some relevant biases are therefore likely to remain, as previous debates regarding the capacity to restrain creeping EU competences through instituting a principle of subsidiarity or to genuinely constitute modes of private governance beyond the state have continuously reaffirmed.[141]

While institutions can eventually transform, the jurisprudence of process shows that these 'structural biases' underpinning legal-political institutions are often hard, if not impossible, to overcome.[142] This suggests a need to keep under critical scrutiny any substantive value underpinning (or that according to many authors should still underpin) the pervasive 'global regulatory hegemony' that the EU is exerting

[140] ibid 14–17.

[141] See AE de Noriega, *The EU Principle of Subsidiarity and Its Critique* (Oxford, Oxford University Press, 2002); and E Meidinger, 'Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel' in C Joerges, IJ Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (London, Hart Publishing, 2004).

[142] M Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7.

in several socio-economic domains, whether this is guided by some ready-made parameters of 'welfare,' 'legitimacy', 'justice', 'constitutionalism', 'good governance' or other substantive value that purposively seeks to 'include the other'.[143] To avoid falling prey to cynical anti-formalism, part of the scholarly and practical effort is to promote a 'culture of formalism' within these diverse legal processes beyond EU frontiers to give the necessary space and horizon for active socio-political engagement towards institutional change or transformation.[144] As Salminen, Rajavuori and Eller's chapter argues with respect to the foreign reach of EU law through supply chains, private international law plays a key role in this respect given the EU's long experience in using it to manage pluralism by enhancing socio-political autonomy and at the same time promoting integration.[145] Yet especially with those subaltern groups and grassroots movements that resist becoming co-opted by the predominant technocratic or policy parlance, such as indigenous peoples and other modes of non-extractive or local production, awareness of this inherent perspectiveness suggests that in some situations the best way of including is paradoxically by excluding the 'other' through modes of 'a-legality' to preserve them in their otherness.[146]

This ambivalent role of human rights or other purposive values directly connects with the second contribution that Cremona and Scott make with respect to these functional elements: the tension between EU interests and values that underpins this foreign reach of EU law. Building upon some of the contributions to their volume, Cremona and Scott highlight how promotion of democratic and rule-of-law values, as well as human rights, has been one of the main functions guiding the external agenda of the EU in seeking their global dissemination. This function finds its legal basis in Articles 3(5) and 21 Treaty on European Union and has led to widespread characterisation of the EU as a 'union of values', which relates to an enduring perception regarding the foreign role of the EU whether in earlier characterisations ('Normative Power Europe') or some of its most recent instantiations ('Good Global Actor').[147]

While it may be in the EU interest to promote its values abroad, Cremona and Scott also highlight some problematic interests underlying that purportedly noble quest. These interests include subjecting foreign countries or regions to international legal frameworks that constrain their range of developmental strategies. It also includes requiring from foreign countries or regions a level of compliance with international legal standards that the EU follows less rigorously (that is, double standards). Even more problematically, it also includes diverting or shielding its own responsibility

[143] J Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MIT Press, 1998). In this vein, see I Koivisto, 'Varieties of Good Governance: A Suggestion of Discursive Plurality' (2014) 27 *International Journal for the Semiotics of Law – Rev int'le de Sémiotique juridique* 587.

[144] M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, Cambridge University Press, 2004) 494 ff.

[145] In this vein, see R Michaels, 'Post-Critical Private International Law' in H Muir Watt and DP Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford, Oxford University Press, 2014).

[146] H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford, Oxford University Press, 2013).

[147] See, respectively, Manners (n 85); and Fahey and Mancini (n 4).

for violation of international law, as in the agreements that the EU has made with key countries to prevent migratory inflows into the EU as part of its controversial 'Global Approach to Migration and Mobility'.[148] Beyond these specific contradictions between EU foreign policies and its declared stance as a purported 'union of values', Scott and Cremona conclude by highlighting how in its external dimension the EU experiences a pervasive tension concerning whether 'it would be unreasonable to expect third countries to accept the EU's political interests as universal values' as well as how to 'ensure that it operates in compliance with its own self-proclaimed values'.[149]

The jurisprudence of process tradition offers certain guidelines to address these questions on how to generate such a transnational legal normativity. As a matter of institutional design, alongside enabling socio-political 'interaction' within the specific regime by empowering more actors to engage with the content and impacts of certain decisions through proceduralisation, the theory identifies two supplementary ways to enhance this normativity. One is to multiply interpretative fora for the elaboration of underspecified norms or generation of new norms within or beyond the specific regime, as a way to trigger institutional awareness and contestation towards the content or implications of those legal commitments. Among other issues, this places the lawyerly focus on opening up doctrines of 'standing' throughout European transnational legal processes. The third way is to subsequently promote the internalisation of the mentioned interpretations whether through social, political, or legal avenues, such as information campaigns, lobbying, strategic litigation, or other modes of legal/political mobilisation. These mechanisms (that is, interaction, interpretation, and internalisation), which encompass several actors, norms, institutions, and means of communication between them, thus represent three recursive steps for enhancing legal integrity and an overall 'fidelity to law' throughout transnational legal processes.[150]

As a matter of theoretical and methodological standpoint, this tradition also points to the relevance of avoiding use of some fixed or ready-made parameter of legitimacy to assess institutional practices. The framework rather requires appraising how legitimacy is actually 'constructed and contested' by those participants in these institutional practices through socio-legal methods.[151] In other words, with respect to the tensions between interests and value highlighted by Cremona and Scott, a European transnational private law informed by such a neopragmatic jurisprudence of process would draw attention to how neither interests nor values are immaculate or pre-defined within these institutional dynamics, but they are usually made and re-defined through *praxis*. This entails a post-idealistic and a post-materialistic account of institutional practices that renews the theoretical perspectives and

[148] For a specialised study on the latter, see Ryan (n 111).

[149] Cremona and Scott, 'Introduction – EU Law Beyond EU Borders' (n 15) 2–4; with reference to Ryan (n 111) 3.

[150] HH Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review*, 181–208; and HH Koh, 'Why Do Nations Obey International Law' (1996) 106 *Yale Law Journal* 2599.

[151] J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

parameters of analysis regarding the question of promotion or compliance with EU values on the external dimension of EU law, as:

> … it should be obvious that a 'non-ideal' refection on problems of praxis does not deny the importance of "ideals" or values but proposes a different way of realising them. To put it simply, this approach is neither some form of political (or scientific) 'realism' at basement prices, nor is it an endeavour, such as analytical ethics, which elaborates on the principles of morality. A non-ideal approach to acting does take values seriously but proceeds by not providing ideal targets against which the actual order can be assessed, but by identifying specific failures. It diagnoses them, and prescribes a remedy that need not be universally applicable but that might 'work' because of 'local' or historical conditions. [In this sense,] … praxis directs our attention to the *Aufgaben*, that is tasks that are given and entrusted to us, which must be 'taken care of' – by correcting again and again the problems that come up because our understandings and capacities are limited – while we strive to go on with our individual and collective projects.[152]

There may be something distinctively (and tragically) European about these non-ideal trade-offs,[153] and chapter five by Letto-Vanamo in this volume reminds us from a historical perspective of the relevance of this pragmatic, contextual engagement with European transnational legal processes in its emphasis on 'glocalised' studies of European transnational private law.[154] Yet, as Harold Koh has lately stressed, as a theoretical framework the jurisprudence of process is driven by aspirations that 'are not just analytic, but transformative'. This conveys the constitutive aspect of the account in generating transnational legal normativity. While from an observational standpoint transnational law appears as a seamless web of complex interactions among different players, as a framework of analysis the goal of transnational legal processes is 'not simply to ratify existing practice but to elevate it'. In this sense, transnational legal processes transcend a mere naturalistic focus on explaining how states or other transnational institutions behave within foreign policy domains. It seeks to uncover why these institutions behave in a certain way and particularly the distinctive role of law in shaping their behaviour. To comprehend the interaction between law and policy within the complex landscapes of contemporary transnational law, Koh powerfully asserts, we need to move beyond the mere assertion that [EU] law matters. We rather need to trace 'how and why [EU] law matters in this brave new world'.[155]

[152] Kratochwil (n 37) 285, 288, 291.

[153] Middelaar (n 8): 'Classic American history is at heart a morality play of right versus might. Russia's is a cynical chronicle of might versus might. China's is a well-arranged harmony. European history has given us a tragic awareness that politics very often is right versus right – peace versus justice, equality versus safety, liberty versus democracy. We Europeans do not play to win but to minimize losses.'

[154] Letto-Vanamo, in this book, stressing that 'what also needs to be studied, in spite of practical and methodological difficulties, are local conditions (social, cultural, geographic) under which the process of cultural translation and thus localisation of potentially global normative knowledge has been or could be reproduced'. For concrete illustrations on why this approach is relevant and how to pursue it, see also M Goodale and SE Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge, Cambridge University Press, 2007).

[155] HH Koh, 'Transnational Legal Process and the "New" New Haven School of International Law' in JL Dunoff and MA Pollack (eds), *International Legal Theory* (Cambridge, Cambridge University Press, 2022) 115–18: explaining how this 'idea of normativity connects the Transnational Legal Process School to the "Constructivist" School of international relations. Unlike interest theorists, who tend to treat state

This points to the importance of supplementing ubiquitous calls for proceduralisation or establishing a transparent regulatory quality framework for considering the interests of foreign communities, countries, or regions in the external dimension of EU law. The basic proposition of process jurisprudence that regards law as a process of authoritative decision-making rather than a mere set of abstract rules suggests and has eloquently shown that not everything is decided when a certain EU legal act or decision is issued. Much more remains at stake and can be gained through careful socio-legal research on the social, economic and political context of the legal act, as well as concurrent regulatory initiatives, or their respective implementation and enforcement avenues, as it is in any of these instances through which significant policy choices, reformist drives, or modes of resistance towards a given decision can also be channelled.[156] A research agenda on European transnational private law informed by the jurisprudence of process tradition can thus open new avenues of qualitative socio-legal research beyond merely generalist appeals to enhancing the reflexivity, responsiveness, or discursiveness of EU legal acts through their proceduralisation. It is key for these purposes to conceive the foreign reach of EU law as a dynamic and open-ended process that unfolds in a transnational context.[157]

These insights directly correlate with the pragmatic visions of legality that have been informing the jurisprudence of process since its origins. As explained in section II, these visions sought to overcome a purely formalistic and purely realistic view of law as a set of primary rules backed by sanctions, by highlighting how modern legal systems usually involve processes of authoritative decision-making driven by policy mandates that are continuously implemented, reshaped, and resisted throughout recursive and multipolar cycles that involve different types of actors and institutions. The vision of law implicit in these processes is the legal pragmatism underpinning the post-war synthesis of legal formalism and legal realism, which sees law and legal developments as inherently connected to the practical resolution of social problems. As elaborated in section II, this is the vision that provided the intellectual background in which Jessup articulated the very notion of transnational law in his landmark Stork Lectures of 1956.

Drawing inspiration from Jessup and his current legacies in contemporary developments on transnational law and transnational legal studies, throughout studies on European transnational legal processes one can finally seek to retrieve this seminal motivation by asking: what are the social needs that EU law is seeking to safeguard

interests as exogenously given, constructivists have long argued that states and their interests are socially constructed […].'

[156] J Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; Eskridge (n 28); SF Moore, *Law as Process: An Anthropological Approach* [1978] (LIT Verlag Münster, 2000).

[157] P Zumbansen, 'Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham, Edward Elgar Publishing, 2019): 'Transnational law challenges the possibility of [legal] coherence by scrutinising the dynamics at the heart of a legal field. The law with which we engage in this space of self-critique is never complete or "finished". Rather, as legal "field", it is an unstable ground on which competing claims are negotiated with regard to values, societal expectations, doctrinal coherence and "system" as well as the field's openness to future challenges. Seen that way, a legal field prompts an inquiry also into the process through which we reengage with what law is, should be, can be.'

throughout this range of voyages beyond its internal market? Chapter 14 by Salminen, Rajavuori, and Eller, for example, highlights the interplay between free commerce and geo-security as cutting across the three types of regulatory approaches to value chains informing the varied EU initiatives. Chapter 13 by Ulfbeck places the focus on evolving conventions on social and environmental sustainability beyond EU frontiers as driving recent developments in European (regulatory) tort law.

Why is this relevant? On the one hand, this renewed functional dimension enables us to consider legal/regulatory effectiveness an additional parameter for assessment, which in turn opens a series of relevant questions. Is the EU effectively fulfilling the purported social needs that it claims to safeguard in its external dimension? To what extent may other regulatory approaches or strategies be better suited for doing so? Are these social needs something that the EU ought to fulfil? Who is winning and who is losing as a result of these foreign regulatory engagements? Some of these questions have been raised by several contributors to this volume. Beckers, for instance, closes chapter two by stressing how a research agenda on European transnational private law requires a 'complementary analysis from the perspective of those affected together with a related discussion on what European transnational private law means from the outside'. Chadwick likewise in chapter nine provocatively highlights how EU law has become the agent of financial markets driven by the interests of capital.[158] All these questions relate to the social basis/impact of law that is one of the hallmarks of the jurisprudence of process.

Nevertheless, through studies of European transnational private law one can seek to cast normative questions wider by extending them from material to cultural implications. As to this cultural dimension, a key question is whether and to what extent the external dimension of EU private law is affecting core notions of private law and overall private law cultures of foreign countries or regions. Hans Micklitz has addressed this question in the internal dimension concerning the relationship between EU private law and the private law institutions and cultures of its Member States.[159] In connection with the FiDiPro project, this analysis of the extension of EU private law's 'visible hand' beyond EU frontiers has been gradually taken to certain foreign countries or regions, such as EU neighbouring countries,[160] parts of Asia,[161] Africa,[162] and Latin America.[163] Nevertheless, these are still relatively specific accounts, focused on certain market relations (B2C) or legal institutions (the ECJ). The present volume has significantly expanded this research scope by focusing on other types of institutions, such as EU administrative agencies (Micklitz), EU legislation (Salminen, Rajavuori,

[158] Chadwick, in this book: 'EU law is not governing financial markets; EU law (and policy) is *on the market*.'.

[159] See, in general, Micklitz (n 100); and HW Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 *Yearbook of European Law* 3.

[160] Reich and Micklitz (n 135).

[161] M Durovic, G Howells A Janssen, HW Micklitz (eds), *Consumer Protection in Asia: Past Present Future,* (Oxford, Hart Publishing, 2022).

[162] HW Micklitz, T Naude and C Twigg-Flesner (eds), 'Special Issue on Consumer Law and Policy in Africa' (2018) 41 *Journal of Consumer Policy* 303.

[163] M Barata, L Bernstein, C Lima Marques and HW Micklitz (eds),'Special Issue Consumer Law in South America' (2022) 45 *Journal of Consumer Policy* 1–147. See also, in general, chapter 8 by Micklitz in this book on the external dimension of EU consumer law.

and Eller), or private regulators (Chadwick), as well as other types of market relations, such as labour (Liukkunen), creditors (Macacci), and suppliers or affected communities (Ulfbeck). Nevertheless, much more terrain remains to be covered and appraised to fully reckon with the cultural effects of European transnational private law.[164]

IV. THE PROSPECTS OF A EUROPEAN TRANSNATIONAL PRIVATE LAW: GEOPOLITICS AND POST-COLONIAL ENCOUNTERS BETWEEN GOVERNANCE AND GOVERNMENTALITIES

To what extent, if at all, can the jurisprudence of process distinctively sustain (that is, justify and orient) current and future enquiries on the external dimension of EU law through the notion of European transnational private law? In its foundational aspiration, this has been the research question driving the present chapter. To answer this question, the chapter started by reviewing the basic tenets of the jurisprudence of process tradition through recollective engagement with some of its pioneering formulations in the national, international, and transnational levels and discussed its foundational place and role in the constructivist configuration and evolution of the EU as a political project. On these bases, the chapter underscored at least three distinctive contributions that the jurisprudence of process makes as a foundation for the study of the foreign reach of EU law as a phenomenon.

Building upon the seminal scholarship of Bradford and Scott, as well as other legal and non-legal studies on the phenomenon, the chapter first underscored the importance of transiting from an international relations paradigm driven by a public law rationale that is predominant in the literature to a transnational relations paradigm that also encompasses and critically reflects upon the constitutive place of private law in terms of global or foreign market orders and the socio-political relations underpinning them. This retrieves some of the jurisprudence of process insights on the constitutive place of law and connects the jurisprudence of process framework with earlier insights from institutional accounts of law and contemporary studies on law and political economy in national and transnational governance.

The second contribution was an expanded taxonomy of the different modes through which EU private law is travelling beyond EU frontiers by drawing upon the socio-legal purview of legal sources informing the jurisprudence of process tradition and contemporary developments of comparative law as a twin sister of transnational law. These include salient 'societal' and 'collateral' modalities, as well as refined accounts of the nowadays established 'unilateral,' 'bilateral', and 'multilateral' modes of foreign reach of EU law. As shown in section III.B, this renewed taxonomy

[164] In this vein, see the illuminating work that Julian Arato has been engaged in with a similar kind of examination from the perspective of international investment law, by analysing and appraising how international investment law has been transforming key private law institutions throughout the globe. See mainly J Arato, 'The Private Law Critique of International Investment Law' (2019) 113 *American Journal of International Law* 1; J Arato, 'The Elastic Corporate Form in International Law' (2021) 62 *Virginia Journal of International Law* 383; and J Arato, K Claussen, JmLee, and G Zarra, 'Reforming Shareholder Claims in Investor-State Dispute Settlement' (2023) 14 *Journal of International Dispute Settlement* 242.

contributes to expanding and nuancing the study of each of these modalities through which EU law is travelling beyond EU frontiers as well as their relationships.

Drawing upon the pragmatic, contextual, and purposive tenets of process jurisprudence, the chapter finally suggested the importance of innovating on the way European transnational legal processes are studied in at least three specific ways. Against the tendency of the literature to devise an abstract and ready-made normative parameter from which to assess the practice – whether it is 'welfare', 'legitimacy', 'justice', 'constitutionalism', or 'good governance' – the chapter first underscored the importance of pragmatically analysing how these normative commitments or other values are constructed, contested, and ultimately rearticulated or 'cared-for' (*Aufgaben*) by the relevant participants in practices within the respective contexts and non-ideal conditions in which they are operating. Second, the chapter suggested the importance of extending the focus beyond ubiquitous appeals to the proceduralisation of EU rulemaking and an expanded EU regulatory quality assessment to integrate foreign interests and perspectives in the foreign reach of EU law to the overall legal or regulatory processes involved. In this vein, the chapter underscored how tracing and fostering different venues of legal interpretation and mechanisms for the internalisation of these interpretations at all stages of the regulatory process can contribute to generating the sort of transnational legal normativity by the foreign reach of EU law with the principles or normative aspirations that purportedly guide them. This entails moving from the relatively trivial assertion that EU law matters abroad to a more refined and tangible understanding of how and why EU law matters throughout the world.

Lastly, and as a complement to the tendency in the literature to focus on questions of reciprocal policy influence between the EU and other international players, the chapter stressed the relevance of tackling contentious questions regarding regulatory effectiveness as well as the material and cultural implications of the foreign reach of EU law in different socio-economic realms. The chapter drew upon several of the chapters in this volume and other literature on the phenomenon, including the seminal works by Bradford and Scott, to illustrate the relevance of each of these points. If the EU's recent geopolitical awakening, as van Middelaar has argued, is indeed marked by a 'post-pax Americana' that conveys a new 'age of encounters with other great powers, and civilisations that demands pluralistic thinking', the present chapter shows that the process tradition is particularly suited for that style of pluralistic thinking through its recollective engagement with the origins of the jurisprudence of process in national and post-national contexts as well as its interventions in contemporary studies on the foreign reach of EU law. In synthesis, the present chapter has shown that, as a post-formalist and post-realist account of law and legal thinking, which emerged as part of the inter-institutional dynamics of lawmaking and implementation within highly pluralistic contexts within and beyond the state, the jurisprudence of process has the capacity to productively guide current and future studies on European transnational private law through its pragmatic, socio-legal, contextual, purposive, and constitutive purview or analytical apparatus.

Yet the chapter has also underscored some of the blind spots or limitations of the jurisprudence of process. One is ingrained in the very notion of transnational law as a manifestation of the jurisprudence of process in the post-national context.

Although the volume has used the notion of transnational law to frame our enquiries and deliberately taken an EU perspective to understand and assess the role of EU private law outside the internal market, these relationships cannot be represented in a mere dualistic way as based on a sharp inside/outside binary. What the exponential development of transnational law and transnational legal studies has shown is that the contemporary legal landscape is more plausibly conceived through the image of a complex network with different 'nodes' or lawmaking institutions. This image signals that the notion of transnational law is productive for studying the foreign reach of EU law because it critically reminds us that these European transnational legal processes cannot be studied as a one-way street (that is, from the EU towards the outside), but requires multi-polar, pluralistic thinking rather than mere dualistic thinking.[165] Section III.B.iii offered several examples of perceived modes of the foreign reach of EU law that were the result of previous modes of foreign legal-political influence over Europe. The overall point is that in principle there is nothing wrong in appropriating a legal transplant, to the extent that this is a conscious and justified choice rather than a casual incorporation by perceived description.

A second blind spot is the inherent perspective of these judgements concerning the different modalities and desirability of the ways that EU law is travelling abroad. This entails that the purposive drive to pragmatically find novel, fairer ways to 'include the other' (Habermas) in European transnational legal processes also requires cultivating a reflective awareness that at times the proper way to include is by excluding others from these processes in order to preserve them in their otherness through modes of 'a-legality' (Lindahl). This hints at a certain irony underpinning the jurisprudential foundations of European transnational private law, as they would thereby inevitably rely to some extent upon post-foundational grounds.[166]

This reflective awareness is particularly relevant for the study of the encounters between EU law on those of foreign countries or regions, as these are prone to be politically charged encounters. This is not only due to the developmental strategies or distributive issues that may contingently be at stake. Even if grounded upon a pragmatic quest to construct geopolitical authority and enhance modes of socio-political enfranchisement or integration of foreign countries or regions with EU external policies, it is also because these encounters take place against the backdrop of long, deep, and pervasive histories of European colonialism that only recently are being duly unveiled, appraised, and recognised.[167] This new 'age of encounters with other

[165] G Shaffer, 'Transnational Legal Process and State Change' (2012) 37 *Law & Social Inquiry* 229. For an illustrative application, see J Lander, *Transnational Law and State Transformation: The Case of Extractive Development in Mongolia* (Berlin, Routledge, 2019).

[166] On contemporary developments of post-foundational political theory, see O Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh, Edinburgh University Press, 2007); E Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism* (Oxfordshire, Routledge, 2016); and F Wilhelm, *Political Difference and Global Normative Orders* (Berlin, Springer International Publishing, 2022).

[167] SR Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6; L Salaymeh and R Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 166. See also, for a broader retrospective, M Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge, Cambridge University Press, 2021).

great powers, and civilisations' (van Middelaar) is, in other words, almost inevitably an age of post-colonial encounters, which brings a distinctive level of gravitation and responsibility for whoever claims to be authoritatively speaking in the name of 'Europe' on a comparative or global stage.[168]

Critique does not need to decay into political cynicism but may render a refreshing and creative awakening in the search for a renewed *raison d'être* for the EU beyond its frontiers (De Burca). As this chapter has shown, studying the external dimension of EU law through the pragmatic, socio-legal, contextual, purposive, and constitutive analytical cornerstones informing the jurisprudence of process can significantly contribute to this renewed awakening. Yet this quest for *telos*-building also requires complementing the prevalent focus on EU transnational *governance* and its reflexive, experimental features through process and proceduralisation with an eagerness to explore how, at the same time, this 'new governance mode of foreign policy'[169] translates into different EU transnational *governmentalities* within diverse socio-economic sectors. This can be done through granular attention to the *dispositif* of instruments, technologies, mechanisms, discourses, and rationales informing these policy processes and the institutions underpinning them.[170]

Rather than a theory or method, governmentality is better conceived as an analytical toolbox driven by a distinctive set of questions regarding these *dispositifs* of governing that are 'amenable to precise answers through empirical inquiry'.[171] As an analytical approach that equips us to understand law and governance beyond inter-institutional dynamics of power and authority, governmentality in this sense is a suitable and valuable complement to the jurisprudence of process framework to scrutinise the pathways and implications of EU law beyond its frontiers. In contrast to the jurisprudence of process, what governmentality adds to the picture is a distinctive focus on [EU] transnational governance 'as an eminently practical activity that can be studied, historicised and specified at the level of the rationalities, programmes, techniques and subjectivities which underpin it and give it form and effect'.[172] This elicits a productive way to critically discover refreshing insights in the quest for a renewed *raison d'être* in at least three distinctive ways.

The first way is through the potential configuration of new cartographies of power. One of the distinctive features of governmentality is its capacity to trace and engage with modes of political power beyond institutionalised politics or institutionalised

[168] P Singh, 'The Private Life of Transnational Law: Reading Jessup from the Post-Colony' in P Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge, Cambridge University Press, 2020).

[169] De Burca, 'EU External Relations (n 17); J Zeitlin (ed), *Extending Experimentalist Governance?: The European Union and Transnational Regulation* (Oxford, Oxford University Press, 2015); M Dawson, 'New Governance in the EU after the Euro Crisis – Retired or Reborn?' in M Cremona and C Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (Oxford, Oxford University Press, 2018).

[170] For an overview, see M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Palgrave Macmillan, 2008); and T Lemke, *Foucault's Analysis of Modern Governmentality: A Critique of Political Reason* [1997] (Brooklyn, Verso Books, 2019).

[171] N Rose, PO'Malley, and M Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83, 85.

[172] W Walters, *Governmentality: Critical Encounters* (Oxfordshire, Routledge, 2012) 2.

governance. This is particularly relevant for a research agenda on European transnational private law where much of EU policymaking is being shaped and mediated through prominent private actors and civil society institutions, as well as non-binding instruments or unofficial practices – as the present volume documents. This readily places the foreign reach of European private law within studies of international governmentality that have proven proficient in generating novel purviews of the types of power games and overarching strategies informing these undercurrents of contemporary geopolitics on several socio-economic realms.[173]

The second way is through its creative, refreshing potential. Rather than fulfilling an explanatory or predictive aim, as an analytical toolbox the function of governmentality is mainly diagnostic. With its microscopic attention to governmental practices within and beyond government, governmentality is:

> highly capable of registering all manner of subtle (and not so subtle) shifts in the rationalities, technologies, strategies and identities of governance – shifts that are often overlooked or dismissed by perspectives that focus all their theoretical attention on the so-called bigger picture.[174]

Due to this attention to granular discursive/material practices rather than on particular agents or totalising structures, and its sensibility towards subjugated alternatives driven by its genealogical engagement with the historiographies of these practices, the analytical tools of governmentality are prone to confront us with unexpected insights that may 'prompt us to revise and amend existing concepts, fashion new analytical tools' and, in general, 'open up new ways of understanding social and political problems'.[175]

The third and final way is through its reconstructive, identity-building prospects. Foucault's governmentality shares with the jurisprudence of process tradition its drive for seeking to reconcile some key dualities as a matter of lived experience, such as: structure/transformation, background/transcendence, and object/objective. Similar to the emphasis of the jurisprudence of process on historiographical dynamics based on socio-political struggles, Foucault devises in this way an experiential mode of socio-political critique.[176] This suggests how governmentality complements the jurisprudence of process in proposing a 'critical ontology of ourselves' that can be key for renewed modes of identity-building and socio-political emancipation in the EU's relentless search for itself beyond its frontiers.[177]

[173] S Guzzini and IB Neumann (eds), *The Diffusion of Power in Global Governance: International Political Economy Meets Foucault* (New York, Palgrave Macmillan, 2012).

[174] Walters (n 172) 3.

[175] ibid 5 and chapter 4; and M Dean, *Governmentality: Power and Rule in Modern Society* (SAGE, 2010) ch 2. In this vein, see also, A Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609.

[176] T Lemke, 'Critique and Experience in Foucault' (2011) 28 *Theory, Culture & Society* 26; T Lemke, *Foucault, Governmentality, and Critique* (Paradigm Publishing, 2012).

[177] '… the concept of governmentality is animated by this critical ethos: it is concerned to make intelligible the limits and potentials of who we are and have become, and the ways our understanding of ourselves is linked to the ways in which we are governed, the ways in which we try to govern ourselves and others, and the ways in which this occurs under forms of knowledge postulated as truth by various authorities. By becoming clear about the limits, we open up the possibility of an action to accept or reject them,

Against the temptation of reductively characterising the foreign reach of EU law as *this* or *that*, this book and the notion of European transnational private law informing it shows how complex yet pervasive is the engagement of EU private law alongside transnational policy processes that coalesce from and towards the EU. It also shows how heterogeneous are the place, role, and impacts of EU private law within this range of policy fields. The use of the jurisprudence of process as a framework and governmentality as a toolbox to trace and analyse these and other places or roles of EU private law 'in action' represent in this sense at least two complementary avenues for the progressive development of European transnational private law as a field of study and as a roadmap for searching and instilling tactical interventions within these modes of transnational legal ordering as a matter of practical lawyering.

to show their contingent nature, or to add up the costs of transgressing them. Above all, the point of a critical ontology of ourselves and our present is to make us clear on these risks and dangers, these benefits and opportunities, so that we might take or decline to take action'. Dean (n 175) 14. On this reflective and reconstructivist aspect concerning the foreign reach of EU private law, see R Vallejo, 'Voyaging Through Standards, Contracts, and Codes: the Transnational Quest of European Regulatory Private Law' in Cantero and Micklitz (n 45).