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A Transnational Take on Krisch's Pluralist Postnational Law

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Nico Krisch. ***Beyond Constitutionalism: The Pluralist Structure of Postnational Law***. Oxford: Oxford University Press, 2010. Pp. 330. £50. ISBN: 9780199228317.

Abstract

This essay critiques Nico Krisch's Beyond Constitutionalism: The Pluralist Structure of Postnational Law. *The book's primary foil is the turn to rethinking the international legal order in constitutionalist terms. Its contrasting normative vision is a post-national, pluralist one in which there is no legal centre or hierarchy. This vision, although less ambitious than the constitutional programme, is nonetheless quite radical, and shares more with most constitutionalist visions than it acknowledges. Krisch's critique of his constitutionalist foil could be more radical than it is, and the essay provides arguments for such a critique. Nonetheless, the essay finds that Krisch's* post-national *vision is also too radical for the world outside Europe in being grounded in a European experience, as reflected in his case studies. The essay contends that a framework addressing* transnational *legal ordering in which states continue to play a central role is superior, given the ongoing centrality of the nation state in governance. The essay also finds that Krisch's normative framework fails to address variation in its evaluation of institutional alternatives in which some hierarchy at times is preferable. Krisch's vision is pluralist all the way through, while there are strong pragmatist arguments to be more context-specific in prescriptions.*

Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* is a *tour de force*. It demands reading and reflection. Its launching point is that we have entered a post-national world of law in which national and international law are no longer two separate realms grounded on the sovereignty of the nation-state. Its primary foil is the turn to rethinking the international legal order in constitutionalist terms. Its contrasting normative vision is a pluralist one in which there is no legal centre or hierarchy, but

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rather distinct legal orders that overlap and interact, sometimes accommodating and sometimes contesting each other, sometimes converging and sometimes diverging, in light of different competing and conflicting values, preferences, and priorities, though always pressed (and for Krisch rightly pressed) to take each other into account. The book nonetheless has much in common with its primary constitutionalist foil, reflected, quite provocatively, in a key term in its subtitle – *Postnational Law*. The nation-state, for Krisch, a German law scholar who has established himself as one to be heard, is no longer the anchor, no longer the centre which only relinquishes a bit of its ultimate authority for its own benefit pursuant to its consent to 'international law', the law between nation-states. Rather, in the pluralist vision, the nation-state itself shares ultimate authority with multiple regional and international legal orders with which it interacts without a common normative framework – hence a post-national law within a pluralist structure. This vision, although less ambitious than the constitutional programme it critiques, is nonetheless quite radical, and it shares more with many constitutionalist visions than it acknowledges, much more in fact than the conventional vision of national legal systems and their relationship to international law. Let us first examine the book's contributions before, in the spirit of pluralism, turning to its critique.

1 The Book and its Contributions

A *Alternative Structures: Pluralism vs. Constitutionalism*

The book is in three parts. Part I situates the book's inquiry in a 'postnational' context and discusses alternative legal responses to this context. In Chapter 1, Krisch contends that the traditional conceptual distinction between national and international law no longer provides either an accurate empirical picture of the world as it is, or a normative one as to how it should be governed through law, since national decision-making increasingly has externalities on outsiders and is insufficient to advance national goals. As a result, Krisch argues, different layers of national and international law have become increasingly interwoven so that they can no longer be clearly distinguished. Krisch thus contends that we need a new or revised structural frame for understanding and reimagining legal ordering in this post-national context. He contrasts three structural responses, that of *containment* through reinvigorating oversight by national political and constitutional processes; that of *transfer* through adapting domestic concepts such as constitutionalism and democracy to the regional and global levels; and that of *break* through 'eschew[ing] constitutionalism's emphasis on law and hierarchy' for 'more pluralist models, which would leave greater space for politics in the heterarchical interplay of orders' (at 14–17). The book advocates the last approach – a break – in contrast to a global constitutional one based on a common normative framework and clear allocations of authority.

Chapter 2 introduces and critiques the constitutionalist response to the post-national context, before Chapter 3 sets out the alternative of a pluralist response, and advances arguments for its superiority. Krisch acknowledges the diversity of visions for the constitutional programme, including those informed by a pluralist perspective,

such as those of Neil Walker, Mattias Kumm, and Miguel Poiares Maduro, but ultimately finds them misleading because inherent in a constitutional vision is hierarchy, a hierarchy that constitutes the order in which a people inhabits (at 235).[1] He adds the modifier 'foundational' to clarify what he means by constitutionalism, a 'foundational constitutionalism' which grounds 'the entire system of government' and is constituted by a people, or *demos* (at 41–42).[2] Foundational constitutionalism was born out of Enlightenment rationalist thought and 'the revolutionary projects of the late eighteenth century', symbolizing 'a new order' (at 47) based on the interplay of human rights and popular sovereignty within a principled, reasoned common framework. In Krisch's view, it is not suited to 'the radical diversity that marks the global populace' (at 68).

In Chapter 3, Krisch makes his initial case for pluralism where there is no hierarchy, but ongoing contestation and normative exchange in which ultimate principles are left open. The pluralist process, he contends, can lead incrementally to normative convergence based on mutual accommodation, but it does not necessarily do so, since different polities operate within different legal orders having different normative orientations. In this chapter, he distinguishes what he calls 'systemic pluralism', in which there is no common normative framework, from 'institutional pluralism', in which plural legal orders interact within a common framework. He maintains that 'institutional pluralism' is pluralism lite, and overlaps with variants of global constitutionalist thinking (at 77). He then explores the normative appeal of 'systemic pluralism' in which different layers of law are enmeshed in a post-national world, and yet interact without a common framework. Krisch maintains that systemic pluralism is appealing, despite the lack of a stable transnational rule of law, because it allows for contestation and resistance to hegemony in a world of diverse values and perspectives, facilitates flexible adaptation to a world characterized by uncertainty and rapid change, and provides for checks and balances between different normative orders. He finds that such a systemic pluralist structure not only accounts better for current social practice, but is normatively preferable. From a normative perspective, it best balances the inevitable tensions between the norms of inclusiveness, on the one hand, and self-determination by groups, on the other.

[1] As Jeffrey Dunoff and Joel Trachtman likewise write, 'constitutionalization can respond [to fragmentation of international law] by providing centralized institutions or by specifying hierarchy among rules or adjudicators': Dunoff and Trachtman, 'A Functional Approach to International Constitutionalization', in J. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), at 3, 8.

[2] Krisch distinguishes 'foundational constitutionalism' from 'power-limiting constitutionalism', which he finds 'fail[s] to connect with the more radical promise connected with it [constitutionalism] historically': Krisch, at 298. The vision of a functional power-limiting constitutionalism is put forward by Dunoff and Trachtman, *supra*, at 19–21 (the first two functions listed being allocating governance authority horizontally and vertically). For a foundational sense of the term see also Walker, 'Reframing EU Constitutionalism', in Dunoff and Trachtman (eds), *supra*, at 149, 151 ('Whether in the natural or the political world, the term *constitution* necessarily implied, and implies, the existence of a discrete and self-contained entity – a polity or political community – as the object of constitutional reference'); and Sweet, 'Constitutional Courts', *Oxford Handbook of Comparative Constitutional Law* (forthcoming) ('the ultimate measure of legitimacy for any CC [Constitutional Court] may well be its success at helping the polity construct a new "constitutional identity"').

B *Three Case Studies of Post-national Pluralism*

Part II of the book presents three case studies that illustrate how post-national legal pluralism operates, covering human rights, security, and regulatory politics. The first case study, comprising Chapter 4, concerns the development of the European human rights regime enshrined in the European Convention on Human Rights and the European Court of Human Rights (ECtHR) created pursuant to it, under which individuals now have direct rights of access to bring claims pursuant to Protocol 11. Individuals have brought over 642,655 individual claims before the ECtHR, resulting in more than 12,000 judgments,[3] with over 91 per cent of these claims being brought since 1998.[4] Krisch maintains that, despite high rates of state compliance with rulings of the ECtHR, with many national courts regularly citing ECHtR jurisprudence, compliance is not automatic, but contingent. He notes that '21 out of 32 responding European constitutional courts declared themselves not bound by ECtHR rulings' (at 127). For example, national courts resisted rulings by the ECtHR on the role of advocates general in proceedings, but following this national resistance the ECtHR softened its requirements, accommodating national concerns (at 140). Krisch further addresses the pluralist interaction of different institutions at the European level, those of the ECtHR and the European Court of Justice (ECJ). The ECJ (now CJEU) and ECtHR are formally in separate legal systems, but have engaged in implicit dialogue with each other. The ECJ has not accepted the rulings of the ECtHR as binding, but found them to be 'a source of inspiration', and cites them as authoritative in its own jurisprudence (at 133), leading to gradual convergence over time (at 129). The post-national European legal order for human rights thus involves not only vertical interaction among national courts and the ECtHR, but also horizontal interaction among supranational European Courts in a pluralist legal structure.

The second case study, comprising Chapter 5, concerns the adoption by the UN Security Council (UN SC) of a legislative role in response to the 11 September terrorist attacks. Under Article 103 of the UN Charter, the Charter is hierarchically superior to all other international treaties so that its provisions prevail in the event of a conflict with another treaty provision. Under Article 25 of the Charter, all UN members 'agree to accept and carry out the decisions' of the UN SC. By its terms, the UN Charter can thus be seen in hierarchical terms, befitting a constitutional order. In the post-Soviet world after the Berlin Wall's fall in 1989, the UN SC has become considerably more active, in some ways more closely approximating the initial vision for it. Its sanctions regimes today bear little resemblance to classical international law, since the rules are passed by a majority vote of a 15-member body, as opposed to agreement by states; are

[3] European Court of Human Rights, *50 Years of Activity: The European Court of Human Rights – Some Facts and Figures* (2010), at 3, 12, 13, available at: www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf (stating that as of 1 Jan. 2010, 389,197 applications had been allocated to a decision body and 253,458 applications had been declared inadmissible).

[4] European Court of Human Rights, *The European Court of Human Rights in Facts and Figures 2011* (2012), at 8, available at: www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf. Approximately 119,300 of these applications were pending as of 1 Jan. 2012: *ibid.*, at 5.

increasingly precise and administrative in character; and directly affect individuals (at 156). Yet, Krisch deftly shows how ECJ and state resistance to the UN SC's assertions of authority over terrorist financing led to progressive change in UN SC practice regarding the due process and procedural concerns of those placed on counter-terrorism lists, which result in the freezing of their assets. He examines the ECJ's ruling in the *Kadi* case, where the Court held that the provisions of international law in question could not derogate from EU principles of liberty and respect for human rights (at 169). He notes, in parallel, judgments of other states challenging the adequacy of UN SC procedures, such as the UK, Canada, Turkey, and Pakistan (at 159, 186), collectively creating normative pressures on the UN SC to change its practices in order to forestall further litigation, assure compliance with its decisions, and uphold its authority. The SC has, in response, delisted a number of individuals, and revised its procedures multiple times. In December 2009, the UN SC created the position of an Ombudsman empowered to receive and raise delisting requests (at 159).[5]

The third case study, comprising Chapter 6, turns from human rights and international security to regulation – that of genetically modified (GM) foods, an issue on which I have co-written a book from which Krisch draws and which he, in part, critiques.[6] The focus of our book, *When Cooperation Fails*, was on two powerful jurisdictions – those of the US and EU – who adopted radically different approaches to the regulation of GM foods and tried to use transnational networks and international institutions as leverage to advance their positions globally. The book notes the distributive consequences (material, political, and social) of either side compromising, and concludes that this area of law illustrates where international cooperation through international networks and international organizations confronts severe limits, and thus can be viewed as failing. Because the US and EU disagreed on GM regulation, other countries had somewhat more freedom to choose among regulatory alternatives, but at the same time were placed in difficult straits. Argentine farmers, for example, adopted GM soy, but Argentina passed a law that no GM seeds could be planted until they were approved in the EU, in order to ensure that those which had been approved would not be denied entry to the EU because they were inadvertently mixed with minute quantities of a variety that the EU had not approved.

Krisch casts this story in terms of horizontal and vertical pluralism, noting the tensions among institutions at the international level (the WTO, Cartagena Biosafety Protocol, and Codex Alimentarius Commission), the European level (the European Food Safety Authority, European Commission, and Council of the European Union), and the EU Member State level (which can resist both WTO and EU dictates). He shows how, on the one hand, the EU has accommodated the WTO's general approval of risk-based analysis, but on the other hand remains deeply resistant to approving GM varieties that pass through the risk assessment process, in particular because of the likely response of EU Member States. The WTO panel decision took account of

[5] Created by S.C. Res. 1904, 17 Dec. 2009, available at: www.un.org/ga/search/ view_doc.asp?symbol=S/RES/1904%282009%29.

[6] M. Pollack and G. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (2009).

these tensions. Although the panel found against the EU, the decision was relatively open-ended, conducive to ongoing political negotiation and pluralist exchange (at 196).[7] Krisch finds this result to be normatively desirable, reflecting the advantages of a pluralist approach over a constitutionalist one in accommodating a world of different collectives that normatively disagree. As he writes, '[l]eaving issues of principle and hierarchies undecided may allow space for pragmatic solutions on issues that are less fraught and might provide a safety valve when one or the other site of governance overreaches' (at 221).

C *The Pluralist Advantage in Terms of Order, Power, Democracy, and the Rule of Law*

Part III builds from the case studies to assess the post-national pluralist vision in comparison with its constitutionalist foil. Krisch correctly notes that, like all alternatives, the pluralist vision is beset by trade-offs, and he assesses these trade-offs in comparison with those facing the constitutionalist vision. Chapter 7 first looks at the prospects of stabilizing cooperation and constructing transnational authority over time. Krisch finds that pluralism facilitates signalling to a decision-maker, such as a WTO dispute settlement panel, that it may encounter significant resistance, so that such decision-maker can tailor its decisions to accommodate difference. Pluralism can thus prevent backlash and broader challenges to the decision-maker's authority. Over time, such accommodation and bracketing of contested normative issues can be more responsive to change, and lead incrementally to more stable governance structures than a hierarchical, constitutional alternative.

The chapter then looks at the problem of power, and how pluralism constrains power in comparison to a global constitutional alternative. Krisch challenges earlier scholars' findings that the fragmentation of international law regimes favours powerful countries.[8] He finds, in contrast, that, although fragmentation may give some initial advantages to powerful states, social actors can become more engaged over time, giving 'initially excluded actors greater influence' (at 301). Citing the work of John Ikenberry,[9] he notes that international institutional settlements aim to lock in particular power constellations which can become difficult to change because of veto powers. Thus, he contends, a pluralist structural framework better permits less powerful actors to construct countervailing norms and institutions to advance their perspectives.[10]

In Chapter 8, Krisch assesses pluralism and global constitutionalism from the perspectives of democracy and the rule of law. Instituting democracy at the global level,

[7] See Shaffer, 'A Structural Approach to WTO Jurisprudence: Why Institutional Choice Lies at the Center of the GMO Case', *NYU J Int'l L & Pol* (2008) 1.

[8] See, e.g., Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 41 *Stanford L Rev* (2007) 595.

[9] See G.J. Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (2001).

[10] See, e.g., Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of Intellectual Property Lawmaking', 29 *Yale J Int'l L* (2004) 1.

as we commonly conceive it, is likely to be impossible. This challenge has thus spurred a considerable literature that reconceives democracy in deliberative, non-domination, and other terms.[11] Since global governance structures are remote from individuals, they encounter greater distrust, potentially undercutting their effectiveness. Krisch finds that a pluralist structure for global governance facilitates contestation and flexible adaptation more than a constitutional alternative, so that international institutions become less threatening.[12]

The value of contestation also lies at the centre of Krisch's response to critics of pluralism from a rule of law perspective.[13] The rule of law, Krisch notes, is not just about certainty and predictability, but 'also about *rule*' (at 282). Where international institutions are not (and perhaps cannot be) grounded in democratic legitimacy, then a pluralist order is needed to contest who gets to define the *rule* in the rule of law.

Krisch nonetheless recognizes the challenge of managing the interface of different pluralist orders in advancing the rule of law, and thus discusses the role of 'interface norms' between different legal sub-orders. Here, he contends, enmeshed institutions within a pluralist structure should take each other into account (at 286), conditionally recognize each other's decisions, as exemplified by the *Solange* judgment of the German federal constitutional court in response to the EU legal order (at 287), and engage in minimalist reasoning where there are frictions (at 291). Over time, he maintains, courts can take on 'multiple identities', suggesting that part of their identity might be a transnational one, potentially leading to reconciliation 'in the absence of ultimate conflict norms' which allocate jurisdictional authority (at 293). The amount of respect that one legal order shows towards another, he contends, should be conditional on the way the other balances self-determination and inclusiveness (at 295).

2 Four Critiques

Krisch advances a particular normative vision with which this reviewer in large part agrees. But in the spirit of pluralism, it behooves the reviewer both to accommodate Krisch's vision and to contest it. Krisch is correct that a constitutional, hierarchical order seems contrary to the world we inhabit. Where there is conflict over different values, priorities, identities, and allegiances in the world, global hierarchical legal ordering also seems normatively undesirable.

This essay nonetheless raises four critiques. First, Krisch's pluralist vision overlaps with those that he criticizes more than he admits, since these alternatives also highlight the value of both transnational cooperation and resistance based on

[11] See, e.g., J. Bohman, *Democracy Across Borders: From* Dêmos *to* Dêmoi (2010); D. Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (2008); de Búrca, 'Developing Democracy Beyond the State', *Columbia J Transnat'l L* (2008) 101.

[12] The institutional facilitation of contestation and revisability are key criteria in contemporary democratic theory. See, e.g., P. Petit, *Republicanism: A Theory of Freedom and Government* (1999); Petit, 'Democracy, Electoral and Contestatory', 42 *NOMOS* (2002) 105; P. Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (2008).

[13] See, e.g., Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', 14 *European LJ* (2008) 389.

legitimate difference. Secondly, Krisch's critique of his constitutionalist foil could be much more radical than it is; rather, his analysis of post-national law parallels many constitutionalist approaches in being very court-centric. Thirdly, Krisch's post-national vision can also be viewed as too radical for the world outside Europe in being grounded in a European 'postnational' experience, as reflected in his three case studies in which Europe is central. A framework addressing *transnational* legal ordering in which states continue to play a central role may be a better one for addressing the world as a whole, in light of the ongoing centrality of the nation state in governance, including in the state's own transformation through transnational processes. Finally, his framework fails to address variation in its normative evaluation of different institutional alternatives in which some centralization and hierarchy may be normatively preferable in some situations more than others, such as for the production of some global public goods. His vision is pluralist all the way through, where there are strong pragmatist arguments to be more context-specific in prescriptions.

A *Similar in their Differences*

Krisch contends that '[p]luralism occupies a middle ground between foundational constitutionalism and softer network forms of international cooperation' (at 300). He writes, 'pluralism helps steer a middle course between these positions – one that does not grant ultimate authority to any collective or process, but can help bring the competing visions into an informal balance' (at 183). Yet Krisch's vision rings quite similarly to those of his foils – those on either side of what he claims to be the pluralist middle ground, sovereign-based intergovernmental networks, on the one hand, and many constitutionalists, on the other. Take, for example, this quotation from Anne-Marie Slaughter who claims that governance through intergovernmental networks constitutes 'a new world order':

> the principle of legitimate difference should be adopted as a foundational premise of transgovernmental cooperation. All regulators participating in cooperative ventures of various kinds with their foreign counterparts should begin with the premise that'difference' per se reflects a desirable diversity of ideas about how to order an economy or society. . . . [A]t a global level, a principle of positive comity, combined with the principle of legitimate difference, creates the basis for a pluralist community of regulators who are actively seeking coordination at least and collaboration at best.[14]

Slaughter's core claim of the centrality of governmental networks for governing a new world order is, as all universalist claims, bold in what it downplays and subsumes, such as the role of centralized international institutions and private non-governmental networks. The main foils in her book are the idea of global government (just as in Krisch's) and the concept of governance through civil society networks. She, like Krisch, places her approach in the middle. Yet, when it comes to the defence of her normative perspective, she writes in very similar terms as Krisch. In fact, in some ways, the framework of a system of government networks, including enforcement and harmonization networks, provides more of a middle ground than does Krisch,

[14] A.M. Slaughter, *A New World Order* (2004), at 248, 253.

since it is based on a form of 'institutionalized cooperation' in global governance,[15] while Krisch stresses a complete lack of institutionalization within a common framework in his pluralist vision.[16]

Similarly, from the opposite pole, the most convincing scholars writing within a constitutionalist frame are not 'foundationalists', but rather constitutional pluralists, such as Neil Walker,[17] Mattias Kumm,[18] Miguel Poaires Maduro,[19] Daniel Halberstam,[20]and Alec Stone Sweet,[21] who write in terms of a framework of common constitutional principles, functions, and other attributes. By labelling the constitutionalist vision as 'foundational constitutionalism' based on hierarchy, Krisch attempts to win the argument by definition. Hierarchy, for most legal theorists, signifies that one entity has the final say. But, as Stone Sweet illustrates, if one defines constitutionalism in these terms, then one must find that France, Italy, and other European states are not constitutional orders since multiple courts claim authority.[22] If one substitutes the term 'constitutional pluralism', as developed by the scholars just noted, for 'foundational constitutionalism', then we get a similar vision. For example, Neil Walker writes:

> constitutional pluralism recognises that in the post-Westphalian world there exists a range of different constitutional sites and processes configured in a heterarchical rather than a hierarchical pattern, and seeks to develop a number of empirical indices and normative criteria which allow us to understand this emerging configuration and assess the legitimacy of its development.[23]

[15] *Ibid*., at 15, 19–22 (describing 'world order' in terms of 'a system of global governance that institutionalizes cooperation and sufficiently contains conflict').

[16] Krisch writes affirmatively, '[t]his kind of pluralism does indeed "pose demands on reality", yet the demands are not institutionalized in an overarching legal framework' (at 104).

[17] Walker, 'The Idea of Constitutional Pluralism', 65 *MLR* (2002) 317.

[18] See Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in Dunoff and Trachtman (eds), *supra* note 1, at 258, 272 ('constitutional pluralism … is not monist and allows for the possibility of conflict not ultimately resolved by the law, but it insists that common constitutional principles provide a framework that allows for the constructive engagement of different sites of authority with one another').

[19] See, e.g., Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in Dunoff and Trachtman (eds), *supra* note 1, at 356, 356 ('constitutional pluralism identifies the phenomenon of a plurality of constitutional sources of authority that create a context for potential constitutional conflicts between different constitutional orders to be solved in a nonhierarchical manner'); Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (2003), at 501.

[20] Halberstam, 'Constitutional Pluralism in Europe and Beyond', in M. Avbelj and J. Komarek, *Constitutional Pluralism in the European Union and Beyond* (2012), at 85.

[21] Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' 1 *J Global Constitutionalism*, (2012) 53. Stone Sweet conceptualizes the European human rights regime as a 'cosmopolitan legal order', which he defines as 'a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship': *ibid.*, at 1.

[22] See Sweet, 'Constitutionalism, Legal Pluralism and International Regimes', 16 *Indiana J Global Legal Studies* (2010) Art. 11. I thank Alec Stone Sweet for this point.

[23] Walker, *supra* note 17. As Walker writes elsewhere, 'at least as the constitutional pluralist views the world, it becomes increasingly difficult if not impossible *not* to conceive of the environment of constitutionalism in non-unitary terms – as a place of heterarchically interlocking legal and political systems': Walker, 'Constitutionalism and Pluralism in Global Context', in Avbelj and Komarek (eds), *supra* note 21.

Just as Krisch refers to 'postnational pluralism', Walker refers to 'postnational constitutionalism'.[24] Once Krisch refers to the importance of developing 'interface norms', he moves toward a common framework for pluralist interaction advocated by constitutional pluralists, even though Krisch pulls back in saying that these interface norms are produced in the sub-orders and can themselves clash (at 312).

From a socio-legal perspective, moreover, courts can formally respect the authority of a centralized international institution while interpreting its rules in a way that transforms them. Take, for example, the judgment of the European Court of Human Rights in *Al Jedda v. the United Kingdom* regarding the UK's imprisonment of the petitioner in Iraq for over three years without charges.[25] The Court, in applying the European Convention of Human Rights, held:

> [I]n interpreting its [the UNSC's] resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity … the Court must choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[26]

Stone Sweet interprets this judgment as one of many which are emblematic of the rise of a 'cosmopolitan legal order' involving the institutionalization of 'complex forms of constitutional pluralism'.[27] Indeed, in viewing the *Kadi* judgment, Krisch recognizes that judicial resistance can also occur in 'constitutional settings' through a 'reconciliation' approach pursuant to which a court interprets UN SC decisions in light of human rights obligations (at 179), just as the ECtHR did in *Al Jedda*, in the process potentially radically transforming, undercutting, or neutralizing them. In practice, the difference between legal pluralism and constitutional pluralism can be a difference in name only. They have more in common than they do in opposition.

A significant reason that Krisch has much in common with most constitutional pluralists is that much of their life work is grounded in the experience of the European Union. Leading legal pluralists (such as Krisch and Mireille Delmas-Marty)[28] and constitutional pluralists (such as Walker, Maduro, and Kumm,) are all European and write from within the European experience.[29] Their visions are not so different,

[24] *Ibid.*

[25] App. No. 27021/08, *Al-Jedda v. the United Kingdom*, available at: www.bailii.org/eu/cases/ECHR/2011/1092.html.

[26] *Ibid.*, at para. 102.

[27] See discussion in Sweet, *supra* note 21, at 58–59.

[28] See, e.g., M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2008).

[29] This is not to say that non-Europeans having a close understanding of Europe do not write of the European experience in a constitutional pluralist vein. See, e.g., Sweet, *supra* note 10, and Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in Dunoff and Trachtman (eds), *supra* note 1, at 326, 328 (noting how comparison of constitutionalism in the US and EU 'reveals that constitutionalism does not depend on traditional hierarchy among systems or interpretive institutions. Instead, constitutionalism can be realized within a system of heterarchy').

and they, in fact, often instantiate their visions through the same case studies, such as the interaction between the UN SC and the European Court of Justice in the *Kadi* decision.[30] Indeed, Maduro was the Advocate-General in the *Kadi* case in which his opinion reflected his constitutional pluralist approach.[31] In other words, both the foil and the vision can be viewed as European projections based on European experience. Similarly, and in contrast, those writing from the perspective of transgovernmental networks, focusing on decision-making by government officials, such as Slaughter, Kal Raustiala, David Zaring, and this author, tend to be from the United States, reflecting the political, sociological, and professional context in which they write.[32]

B *A Tamed Critique of Global Constitutionalism*

Secondly, Krisch could go much further in his critique of the constitutionalist vision (including that of constitutional pluralism), but does not because he shares a similar professional vantage. A more introspective, critical examination of the constitutionalist vision would note that it is written largely by lawyers, and not surprisingly suits lawyers because lawyers come out on top. We see a proliferation of constitutions today, what can be labelled an emerging 'global constitutionalism' as part of a sweep of judicialization around the world.[33] New constitutional courts have been granted powers to overrule decisions of the political process for the first time around the world.[34] Although sometimes disputed, these courts tend to maintain that they have the final say on constitutional interpretation which, given the open-ended terms that are often used, can have a broad sweep. This assertion of power is critiqued by some,[35] but that is not the norm in legal academia.

Krisch could have noted that, from a political perspective, a constitutionalist approach gives greater power to law, legal institutions, and the legal profession, since in constitutional orders, law trumps over legislative politics, and judge-made law is central. A constitutional discourse conveniently gives more power to the primary interlocutors of legal academics. Politicians do not read us; business representatives do not; but courts might. In addition, he could note that, within the legal academy itself, constitutions can be viewed as the pinnacle of the academic pecking order. In

[30] See, e.g., Kumm, *supra* note 18, at 286. See also Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', 6 *Int'l J Const L* (2008) 373, at 381 n. 23.

[31] AG M. P. Maduro in Joined Cases C–402/05 P and C–415/05 Kadi *et al.* v. Council and Commission [2008] ECR I–6351.

[32] See Slaughter, *supra* note 14; M. Pollack and G. Shaffer, *Transatlantic Governance in the Global Economy* (2001); Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', 43 *Virginia J Int'l L* (2002) 1; Slaughter and Zaring, 'Networking Goes International: An Update', 2 *Annual Review L & Social Science* (2006) 211.

[33] See Sweet, *supra* note 2. See also Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia J Transnat'l L* (2008) 72; Hirschl, 'The Judicialization of Politics', in K.E. Whittington *et al.* (eds), *The Oxford Handbook of Law and Politics* (2008), at 119, 126–127.

[34] T. Ginsburg and M. Versteeg, 'The Global Spread of Constitutional Review: An Empirical Assessment' (manuscript on file).

[35] See, e.g., R. Hirschl, *Towards Juristocracy: The Origins and Cconsequences of the New Constitutionalism* (2004); J. Waldron, *Law and Disagreement* (1999).

the United States, international law has not been taken seriously within mainstream law reviews, but viewed as a sub-branch of law relegated to specialized journals. The top law reviews in academic rankings, such as the *Harvard Law Review*, the publication choices of which can determine a US legal academic career, are more likely to publish an international law article if it uses a constitutional frame.

Finally, from the critical sociological perspective of Pierre Bourdieu, law professors may speak in constitutionalist terms simply because that is their professional field, and they do not know better.[36] Law professors tend to teach about courts and court decisions, especially higher court decisions such as those of the Supreme Court in the United States and its counterparts abroad. In contrast, economists tend to focus on markets and their attributes, political scientists tend to focus on legislatures and agencies, and sociologists on social groups, social movements, and social norms. These disciplines' predilections for focusing on particular institutions, ones in which their particular forms of expertise tend to be validated and valued, is not necessarily self-conscious. It is not that they are consciously instantiating a Nietzschian will to power through their disciplinary advantage, but their predilections can certainly be viewed in these terms, reflecting a competition between particular expertises.[37]

In short, Krisch could have been much more critical in his take on the constitutionalist framework than he was. Rather, like the constitutionalist vision, Krisch's analysis is largely court-centric, as his case studies focus on the European Court of Human Rights, the European Court of Justice (now CJEU), and European national courts. Although he addresses the UN Security Council in his second case study, national legislatures, agencies, and transgovernmental networks are largely absent from his

[36] Bourdieu created field theory (in the French original, *théorie des champs*) which examines social subsystems involving patterned sets of practices which rely intrinsically on historically derived systems of shared meanings. These fields of expertise consist of taken for granted beliefs, or *doxa*, which define the field's presuppositions. Bourdieu calls these field-specific sets of dispositions *habitus*. They define individual agency and make action intelligible. In Bourdieu's words, a *habitus* involves 'the forgetting of history that history itself produces': P. Bourdieu, *The Logic of Practice* (trans. Richard Nice, 1990), at 56 (originally published in French in 1980 as *Le Sens Pratique*). See also Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (trans. Richard Terdiman), 38 *Hastings L Rev* (1987) 805, at 805–853; and Guzzini, 'A Reconstruction of Constructivism in International Relations', 6 *European J Int'l Relations* (2000) 147, at 165–166 (applying Bourdieu to the study of international relations). The critical work of Michel Foucault could also be cited in a similar, more radical, critical vein: see, e.g., Foucault, 'Nietzsche, Genealogy, History', in P. Rabinow (ed.), *The Foucault Reader* (1986), at 76; M. Foucault, *Discipline and Punish: The Birth of the Prison* (1977) (trans. Alan Sheridan, 2nd edn, 1995) (describing how knowledge systems produce an internalized disciplinary power); and Smith, 'Positivism and Beyond', in S. Smith *et al.* (eds), *International Theory: Positivism and Beyond* (1996), at 11, 30 (Foucault's later work on genealogy sought to show how academic 'discourses' emerge 'not as a neutral result of scholarly enquiry, but as the direct consequence of power relations. In short, power is implicated in all knowledge systems').

[37] See, e.g., Garth and Dezalay, 'Marketing and Selling Transnational "Judges" and Global "Experts": Building the Credibility of (Quasi) Judicial Regulation', 8:1 *Socioecon Rev* (2010) 113, at 123 (transnational legal norms depend on 'the international circulation of experts and knowledge between the North and the South'); Y. Dezalay and B. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002); and Dezalay and Garth, 'Introduction', in Y Dezalay and B. Garth (eds), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (2002), at 1, 5 ('impacts differ according to the countries, the expertises, and the positions of the importers and exporters').

analysis, as are private business networks and transnational non-governmental organizations. His court-centric focus is thus a rather narrow one. This focus is not fatal for his post-national vision, but it is radically incomplete. Any descriptive and normative analysis of legal norms ultimately should address the interplay of these institutions, particularly in light of the severe limits of courts in developing and applying law.[38]

C *Not 'Postnational', but Trasnational Legal Ordering*

Thirdly, descriptively, Krisch's 'postnational' vision is off the mark for much of the world. His three case studies all refer to European court decisions which he knows best. Yet descriptively, it is doubtful whether most in the United States would view themselves in a 'postnational' world. The same holds true for those in Brazil, China, and India, to cover about 45 per cent of the world's population with four countries.[39] If we are going to test claims regarding the pluralist structure of law in global context, we need case studies outside the US and EU.[40]

A different and, in my view, more accurate term to describe legal ordering today is *transnational* ordering, in which legal norms apply across borders and are conveyed through transnational legal processes.[41] This conveyance of transnational legal norms can occur through courts, but more frequently it involves agency officials in transgovernmental networks, private economic actors, non-governmental activists, and legal and other professionals. When the legal norm becomes settled across jurisdictions, we could speak in terms of a transnational legal ordering, such as those concerning double taxation, tariff bindings, corporate bankruptcy, intellectual property, accountability for human rights violations, money laundering, and (indeed) constitutional judicial review, to name a few.[42]

Much of the construction of global constitutional legal ordering is a combination of bottom-up and top-down processes involving modelling and diffusion of institutional

[38] See, e.g., N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1994); N. Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (2001).

[39] Around half of the world's population lives in China, India, the US, Indonesia, and Brazil, in that order. See Central Intelligence Agency, *The CIA World Factbook*, available at: www.cia.gov/library/publications/the-world-factbook/geos/xx.html (giving the total world population and the population for the top 10 most populous countries, last updated 26 Jan. 2012).

[40] *Cf.* Shaffer, 'Transnational Legal Process and State Change', *L & Soc Inquiry* (2012) 1, and the rest of the symposium issue of *Law and Social Inquiry* (with empirical studies of corporate bankruptcy law in China, Korea, and Indonesia; patent law and competition law in South Africa; anti-money laundering law in Brazil and Argentina; and primary education law and policy in over 70 low- and middle-income countries).

[41] See *ibid.*; Halliday and Shaffer, 'Transnational Legal Orders' (manuscript on file). See also Abbott, 'Strengthening International Regulation through Transnational New Governance', 42 *Vanderbilt J Int'l L* (2009) 501; Abbott and Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in W. Mattli and N. Woods (eds), *The Politics of Global Regulation* (2009), at 44; G.-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010); and P. Zumbansen, *Transnational Legal Pluralism, Transnational Legal Theory* (2010).

[42] See Halliday and Shaffer, *supra* note 40, building from 9 case studies of different domains of human rights, business, and regulatory law.

forms, such as judicial review, and of constitutional norms, such as due process.[43] Transnational legal processes are not captured in the global constitutionalist framework, which focuses on international institutions, nor Krisch's pluralist framework, which focuses on the responses of supranational and national courts (and, to a limited extent, other institutions) to each other. More empirical work of these processes is needed to understand transnational legal ordering.

Most importantly, states remain central to these transnational processes since most legitimate authority remains within the state. It thus seems misleading to use the term post-national to describe the current context, especially outside Europe. In fact, in Krisch's study, states are more central than in most studies of *transnational* legal ordering.[44] Although Krisch notes, at the book's start, the importance of 'international institutions, multilateral companies and transnational non-governmental organizations' (at 5), his case studies are not only court-centric, but also state-centric, highlighting the role of state constitutional court responses (to the ECtHR over human rights), state regulatory responses (such as to genetically modified foods), and state resistance to the UN sanctions regime. In the last case, although Krisch examines the role of the ECJ in the *Kadi* decision, he recalls that one explanation of the ECJ's decision was its concern to uphold its human rights credentials and thus ward off scrutiny and challenges to its authority by national courts (at 172).[45]

As Saskia Sassen's work shows, from a transnational perspective, the state remains central as a political unit, and is thus critical for understanding its own transformation.[46] The state contributes to its own change through its active collaboration with and enabling of transnational forces. Outside the EU context, in particular, the efforts of international bodies to regulate are often subject to resistance within states. This resistance can neutralize, hybridize, appropriate, and transform international and transnational law in distinct and unanticipated ways, which can lead recursively to new international and transnational lawmaking.[47] In this recursive interaction of the state and international and transnational institutions, the state remains central, even

[43] As Tom Ginsburg and Mila Veersteeg write, '[b]y our account, some 38% of all constitutional systems had constitutional review in 1951; by 2011, 72% of the world's constitutions gave courts the power to supervise implementation of the constitution and set aside legislation for incompatibility. … Arguably, this trend is one of the most important phenomena in late 20th and early 21st century government': Ginsburg and Veersteeg, *supra* note 33.

[44] Cf. Abott and Snidal, *supra* note 40; Calliess and Zumbansen, *supra* note 40; and Shaffer, 'How Business Shapes Law: A Socio-Legal Framework', 42 *Connecticut L Rev* (2009) 147, at 147–184.

[45] See also Krisch, at 245 ('the ECJ's strong stance against the Security Council may also be due to a dependence … on national constitutional courts which might otherwise have stepped in to defend due process rights').

[46] See S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006), at 3 ('The national is still the realm where formalization and institutionalization have all reached their highest level of development,' but 'the national is also often one of the key enablers and enactors of the emergent global scale'); S. Sassen, *A Sociology of Globalization* (2007), at 46, 56. *Cf.* S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996), at p. xii ('globalization under these conditions has entailed a partial denationalizing of national territory and a partial shift of some components of state sovereignty to other institutions, from supranational entities to the global capital market').

[47] T. Halliday and B. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crises* (2009); Shaffer, 'Transnational Legal Process', *supra* note 40.

where its institutions and laws are significantly affected in the process. What we are witnessing instead of post-national law is variable pressures and convergences that give rise to transnational legal ordering, with considerable variation within national contexts in light of different institutional and socio-cultural legacies and configurations of power.[48] It is this varying, pluralist interaction of different national, international, and transnational legal orders, of different geographic and substantive scope, which is of growing importance for the empirical study of how law operates today. Krisch, in fact, uses the term transnational when he assesses the interaction of international security and human rights regimes, writing, '[h]ierarchies are here [in the global context] even more contested than in the regional [EU] context, and Europe's internal pluralism . . . then becomes a piece in a broader transnational mosaic' (at 176). The legal ordering that we see is transnational because it implicates multiple states and constituencies within them, but it is not post-national in that states remain central to the creation, implementation, and contestation of transnational legal ordering.

The advantage of the approach to transnational legal orders is that it is grounded in empirical socio-legal study, as opposed to a normative framework. It examines when settlement and alignment between institutions occurs, when it does not, and why. This approach is thus complementary to Krisch's normative approach which explicitly calls for 'more empirical work' and 'deeper inquiries into the institutional dynamics of pluralist orders' in varying contexts (at 70).

D *Pluralist Fundamentalism*

The positive study of transnational legal ordering also has important implications for developing a normative perspective because it opens up the assessment of institutional variation in light of trade-offs. Krisch's pluralist structural framework comes with a particular commitment to the value of contestation, while his constitutionalist foil comes with a greater commitment to the value of order.[49] The positive, empirically-grounded study of transnational legal ordering, in contrast, is important for building a normative approach grounded in philosophical *pragmatism* which recognizes the need for institutional variation in response to different contexts. A central Jamesian/Deweyan pragmatist insight is that 'only theory that works has established

[48] Shaffer, *supra* note 40.

[49] Delmas-Marty's work on pluralism, however, explores how pluralism can lead to order, including through 'harmonisation by approximation', and 'unification by hybridization' involving the melding of different 'ensembles' of law: see M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2008). Krisch differentiates his perspective, noting, '[e]ven Mireille Delmas-Marty, the most influential French theorist of transnational legal pluralism, tames her initially radical-sounding vision by an eventual attempt to create order through overarching rules, softened by way of margins of appreciation and balancing requirements. Just as the later [Neil] MacCormick, Delmas-Marty seems to become afraid of the 'messy' picture she describes and clings to some degree of institutionalized harmony': Krisch, at 75.

[50] Nourse and Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?', 95 *Cornell LR* (2009) 61, at 84. The article also builds from 'philosophical pragmatism's premise that one cannot know one's ends until one assesses means because one's means open up new understandings of ends': *ibid.*, at 70.

its truth; and that there is no way to divorce theory from fact'.[50] Pragmatism comes in many varieties,[51] some of which are radically pluralist and thus resonate with Krisch's approach in noting the importance of experimentation and revisability. Yet, in being attentive to factual context and the trade-offs of institutional alternatives in responding to these contexts, pragmatism should remain open to the value of some institutional hierarchy in particular situations, as in producing some global public goods. In these situations, there is, of course, also need for ongoing experimentation and adaptability. But a core pragmatist message is that the value of hierarchy should be seen along a spectrum, not as an either/or proposition.

Although Krisch acknowledges that each structural vision for global legal ordering that he discusses involves trade-offs, he does not fully address the *conditions* under which there may be a greater (or lesser) need for institutions to act in a more (or less) hierarchical manner, or within a more (or less) common normative framework. In other words, from a comparative institutional analytic perspective,[52] there are areas where international institutions and a common normative framework should play a greater role than in others. Take for example, genocide, or traffic in nuclear weapons, or climate stabilization. Krisch does not explicitly note the institutional choices that need to be made as part of a broader conceptualization of law's place in global governance. It is pluralism all the way through with Krisch. In the world, however, there is, and should be, institutional variation the analysis of which is pragmatically grounded.

Krisch, in fact, recognizes the need for variation when he writes that pluralism 'allows for hierarchies and possibilities of close integration the absence of which typically places limits on network forms of coordination. Pluralism oscillates between hierarchy and network' (at 240).[53] This statement shows much greater flexibility and allowance for hierarchy where institutionally preferable, despite its trade-offs. But such statement is at odds with the message otherwise central in the book that pluralism differs from constitutionalism in that it has no centre, and thus no hierarchy, as reflected in the very next page: 'pluralism is characterized precisely by the absence of a legal and institutional framework to regulate disputes between sub-orders' (at 241). The need for decision-making under a common normative framework coordinated through a centralized institution arises, in particular, with some types of global public goods, such as aggregate efforts public goods.[54] Aggregate efforts global public goods require the combined effort of states to produce a public good (such as climate

[51] See, e.g., L. Menand (ed), *Pragmatism: A Reader* (1997) (with readings from such diverse authors as Peirce, James, Dewey, Mead, Rorty, and Posner).

[52] See Komesar, *Imperfect Alternatives*, *supra* note 37 (foundational work on comparative institutional analysis in law); Shaffer and Trachtman, 'Interpretation and Institutional Choice at the WTO', 52 *Virginia J Int'l L* (2011) 103 (applying comparative institutional analysis to WTO dispute settlement from a broader global governance perspective).

[53] He also notes, 'one would certainly not want all domestically entrenched interests to have a decisive impact on the global level; otherwise, cooperation would be seriously hampered': Krisch, at 185.

[54] For a discussion of the relation of international law, legal pluralism, and different types of global public goods see Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' 23 *EJIL* (forthcoming 2012).

stabilization or ozone layer protection), while individually states each have an incentive to free ride on the effort of others. As a result, states face a collective action problem, and will not invest in the production of the good unless they are assured that other states will make and fulfil their commitments.[55] Centralization has its drawbacks, but for the production of such global public goods, hierarchic, centralized institutions may be needed. Pluralism's virtue is that it accounts better for divergences in value and the distributive consequences of international law, but its vice is in interfering with the production of some types of global public goods, exacerbated in situations requiring a timely response.

In sum, from a comparative institutional analytic perspective, the four frameworks that Kirsch addresses in his book (the traditional dualist structure of international and national law; governance through transgovernmental networks; global constitutionalism; and pluralism) are not preferable invariably across all contexts. Rather, different institutional responses are more appropriate to different situations in light of the relative institutional advantages and disadvantages offered. Comparative institutional analysis, grounded in socio-legal empirical study, eschews a commitment to a pluralist fundamentalism, as it does a commitment to any other universal vision (such as foundational constitutionalism). It rather recognizes the (relative) value of different frameworks in light of (relative) institutional imperfections as applied to particular contexts.

3 Conclusion

In *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Krisch shows how domestic and international law have become increasingly 'blurred' on account of developments in 'trans- and international cooperation', such that 'new conceptualizations are needed' (at 227). He is correct in his critique of the dominant dualist paradigm of international law for being radically insufficient for understanding today's context and for responding to it. In the book, Krisch makes a powerful normative case for pluralism based on respect for individual autonomy in a world of diverse collectivities. His approach is more responsive than a hierarchical, global constitutionalist one to a world of states, with different *demoi*, whose actions affect each other, calling for coordinated, differentiated approaches to governance. He shows why more extreme strategies of containment (nationalism) and global constitutionalism (cosmopolitanism) are normatively problematic. He confronts the fact that the pluralist structural alternative involves trade-offs, and concludes that, overall, it is better at stabilizing cooperation because of its incremental approach to normative settlement, and its flexibility and responsiveness to a changing world. He distrusts hard international law promulgated by centralized institutions that are holistic and unitary (based on a universal *Grundnorm*, or rule of recognition), forming part of what he calls the 'legalization project' (at 303). He rather advocates

[55] S. Barrett, *Why Cooperate? The Incentives to Supply Global Public Goods* (2007). The assessment of the trade-offs of a pluralist structure would benefit from case studies focusing on global public goods such as climate stabilization and ozone layer protection.

the ongoing importance of opening space for pluralist politics in response to distributive conflict, reflecting diverse values, priorities, and perspectives.

Despite the appeal of his vision, it raises a number of concerns addressed in this review. From a socio-legal perspective, the normative frames that Krisch examines, while important in clarifying normative principles, can be applied to obtain similar outcomes. Constitutions, for example (and especially in a constitutional pluralist setting), can be flexibly interpreted and are modified in practice through interpretation in response to social change in ways that are not captured by Krisch's ideal type of 'foundational constitutionalism'. As a result, Krisch's pluralist perspective, in practice, blurs with both the constitutional one (in its constitutional pluralist variant) and the network governance one. Each of these normative frames attempts to address, in overlapping ways, the challenge of reconciling the need for transnational governance and the undesirability of global government.

As traditionally domestic public issues become globalized, states and other actors will develop new institutions. What Krisch describes as the growing enmeshment of national and international law thus leads to the development of what can be called *transnational legal orders*. From a positive perspective, what we need today is further theorizing and empirical study that addresses variation in this legal ordering, and the reasons for it. From a normative perspective, we need contextual analysis of the relative benefits of different institutional approaches in different contexts in light of the factors Krisch analyses so well.

Writing this essay in the region of Ladakh, in the federal state of Jammu-Kashmir, within one hundred miles of the Pakistani and Chinese borders, not far from the Siachin military hospital, and with thousands of soldiers on different sides of the infamous 'Line of Control', the term 'postnational' strikes me as peculiar, and perhaps 'eutopian'. It does not resonate descriptively. And there are strong grounds to critique it normatively, given that each side has nuclear weapons. Among the world's greatest concerns is that one of them could become a 'postnational' failed state, no longer monopolizing the use of force, including of nuclear warheads.

Although transnational legal ordering must be subject to contestation, as in Krisch's pluralist vision, the nation state remains central to it. We have yet to arrive at a post-national world. Although the term post-nationalism goes too far, Krisch's pluralist values of 'taking into account', mutual accommodation, conditional recognition, deliberation, and legitimate difference, will be critical for creating legal orders in transnational governance. As I write this article on the border of India, Pakistan, and China, these values for legal ordering seem of existential importance.