

## The Truth about Legal Pluralism

Samantha Besson\*

Nico Krisch. *Beyond Constitutionalism, The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press 2010), 300 p., ISBN 9780199228317

The latest book by Nico Krisch, *Beyond Constitutionalism*, is a much-awaited book among scholars concerned with the nature of the law beyond the state and the articulation of legal norms stemming from different legal orders, regimes or sources of law generated outside the boundaries of the domestic legal order. They will not be disappointed: the book is a real *tour de force* in an area of legal scholarship where a rigorous survey of the positions and arguments on legal pluralism was long needed. Krisch not only provides a very complete and detailed mapping of the literature in different languages and from different disciplines, but he also develops his own proposal for how best to understand legal pluralism. The book is therefore likely to become both priority reading material for students and an inescapable reference for future legal scholarship in the field.

The scope of the present review does not allow for a detailed treatment of Krisch's rich and nuanced argument. Its purpose, rather, is to summarize the argument of the book, to raise a few general remarks about the way the issue of legal pluralism is broached and then to discuss three specific issues among the many difficult questions one may engage with in the book.

\*Professor of Public International Law and European Law and Co-Director of the European Law Institute, University of Fribourg (Switzerland) and 2011-2012 Fellow of the Wissenschaftskolleg zu Berlin. For my own account of legal pluralism in Europe and beyond, see, e.g., Besson, S., 'European Legal Pluralism after *Kadi*', 5(2) *EuConst* (2009) p. 237-264; and Besson, S., 'Whose Constitution(s)? International Law, Constitutionalism and Democracy', in J. Dunoff and J. Trachtman, (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press 2009), p. 381-407; Besson, S., 'Institutionalizing Global Democracy', in L. Meyer (ed.), *Justice, Legitimacy and Public International Law* (Cambridge: Cambridge University Press 2009), p. 58-91.

*European Constitutional Law Review*, 8: 354-361, 2011

© 2012 T. M. C. ASSER PRESS and Contributors

doi:10.1017/S1574019612000211

## A SUMMARY OF THE ARGUMENT

The book is well written and a very nice read. It may be read in parts or as a whole, and its clear and layered structure guides the reader through a wealth of materials and arguments without ever losing her.

The argument is structured in three parts, each in turn divided into three chapters. Part One exposes the reality of post-national law (Chapter 1) and describes two competing 'visions': the constitutionalist vision (Chapter 2) and the pluralist one (Chapter 3). Part Two turns to the 'empirics of pluralism' (225) and takes three examples of legal pluralism in practice: European human rights law (Chapter 4), United Nations individual sanctions (Chapter 5) and post-national risk regulation in the GMO context (Chapter 6). Part Three discusses common challenges to the pluralist reading of post-national law identified in Part One and exemplified in Part Two, i.e., stability and power (Chapter 7), and provides a more detailed defense against the most difficult challenges: democracy and the rule of law (Chapter 8). The Conclusion summarizes the book's main conclusions and delineates some of the challenges to come (Chapter 9).

The main gist of the argument is the following. Faced with the complexity of the relationship between domestic and international law, the author argues, scholars are called on to break loose from the Westphalian legal and political models and find new paradigms to 'construe the emerging postnational legal order' and its 'structure', i.e., the 'determination of how the different layers of law and their various institutions relate to each other' (14). Extending constitutionalism beyond the state is the 'typical' response of constitutional and international lawyers, says Krisch, but one that fails to account for the reality of law beyond the state, on the one hand, and one that 'falls short of a normative vision', on the other. Instead, the author suggests a 'pluralist vision of postnational law'. According to him, pluralism 'does not rely on an overarching legal framework but is characterized by the heterarchical interaction of various suborders of different levels'. The author argues that pluralism not only does not fit 'the fragmented structure of the European and global legal orders', but it may also be justified by reference to the protection of the 'public autonomy of individuals'. The author puts to rest some of the most important concerns raised by pluralism and, in particular, concerns about stability, power and the rule of law. He also argues that pluralism helps provide some of the basic elements of democratic governance beyond the state.

Importantly, given the complexity of the topic and its constant evolution, the author stresses that his book 'does not pretend to have conclusive answers to these big, open questions or to present a comprehensive proposal for the future development of postnational politics and law. If anything, it claims to clarify the challenge we are facing and some of the key choices that lie ahead' (5, 26, 302).

## A GENERAL ASSESSMENT

There are three general remarks one may make on the way the book broaches its argument before dwelling on three specific issues in the next section.

The first general remark pertains to the absence of a theoretical or conceptual explanation of what a legal order is and what makes an ensemble of legal norms an autonomous one (except for a brief and disparaging mention of Hart and Kelsen at the very end of the book's conclusion: 305-306).<sup>1</sup> One may expect from a book on legal pluralism that it clarifies the meaning of terms such as legal 'order', 'system', 'sphere', 'space', 'whole', 'layer', 'body' etc. that are used throughout the book to refer to the groupings of legal norms beyond the domestic legal order (e.g., 4, 12, 77-78). This is particularly important as those terms are used to distinguish the 'structure' of law beyond the state from the domestic legal 'order' and maybe to explain how the latter may no longer be considered as one (306). Now and then, moreover, the author actually mentions the existence of a postnational or global 'legal order' (23), but without further explanation.

Interestingly, Krisch has made the choice of addressing law and politics beyond the state together and often identifies postnational law with postnational 'society', 'institutions', 'actors', '*demoi*' or other political subjects (see, e.g., 4, 14, 70, 261). Again, it may have been useful to draw a closer distinction between the subject (and, maybe, author) of a set of legal norms and those legal norms. While it is important not to uproot law from politics simply because postnational politics are complex, one cannot assume that political subjects and legal orders necessarily neatly match each other outside domestic boundaries. Doing so merely shifts the burden onto the social and political level, whereas a social and political argument is nowhere to be found in the book. Nor does the author provide a legal argument pertaining to the lack of publicity in the production of much of transnational law, for instance, and to the consequences for their legal nature.<sup>2</sup> Such arguments are needed, however. To follow the book's argument, one would need to know both what turns an ensemble of individuals into a society or a polity co-existing with others or even englobing all others, on the one hand, and what makes an ensemble of legal norms – whether or not they correspond to that polity – an autonomous one that may compete with others in a pluralist 'structure', on the other.

A second remark is in order. It pertains to the use of the term 'postnational' to refer to the law generated outside the boundaries of the domestic legal order. While the notion of postnational law is usefully aligned by the author with that of post-

<sup>1</sup> See, e.g., Culver, K. and Giudice, M., *Legality's Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press 2010) and the review by Waluchow, W., 'Legality's Frontier', 1 *Transnational Legal Theory* (2010), p. 575-85; Kingsbury, B., 'The Concept of "Law" in Global Administrative Law', 20(1) *European Journal of International Law* (2009), p. 23-57.

<sup>2</sup> See Kingsbury, 'The Concept of "Law"'.

national politics to refer to law and politics beyond the state, it is a negative or defensive notion that marks the end of the domestic monopoly on law's production. It cannot on its own explain the articulation of legal norms within postnational law itself. Nor is it very useful when used to explain the imbrication of national and non-national law, since the latter cannot be understood solely by reference to an external/internal divide (e.g., 12). Furthermore, given that the first chapter's starting point is international law, one could have expected clearer delineations of international law from transnational and/or supranational law. This is even more necessary as the author argues as if there exists a 'global' or 'overall order' (23).

From a European perspective, more specifically, one may regret that the phenomenon of European integration is not more carefully delineated from legalization. True, the author often flags the crucial differences between European law and other areas of international law, albeit mostly in terms of degree of development (e.g., 7, 29-31, 89, 292). It would have been interesting to read a more systematic analysis of what integration amounts to and of the differences between integrated and non-integrated legal orders in terms of legal pluralism.

Finally, my last general remark pertains to the book's methodology. It appears from the way in which the author refers to his own project that the law is something that may be described ontologically and researched empirically. This is also the case, it seems, of legal pluralism, which is often referred to as a factual situation (5-14). At the same time, however, legal pluralism is used in the book to refer to the plurality of legal authority and as something one needs to argue for normatively (12-13, 69-70). Interestingly, as the author emphasizes, that ambivalence reflects the way in which legal pluralism is used in current legal scholarship as something that one may both observe and argue for normatively (78). It may have been useful, however, to draw a clearer division between the two approaches in the book. When legal pluralism is contrasted with constitutionalism, indeed, it is the normative understanding that is at stake and at the core of the book's argument. In Chapter 7, by contrast, when the author assesses the stability of pluralism in practice as a social scientist would (250), it is part of a normative argument against the instability challenge (261).

### THREE SPECIFIC ISSUES

#### *The constitutionalism/pluralism divide*

One of the main features of the book's argument is its opposition between constitutionalism and pluralism. Going past first impressions of similarity generated by the '-isms', one may disagree with that opposition. The concepts are different but are not opposites.

Constitutionalism can mean anything from a theoretical and philosophical political model to a normative theory or to an ideology pertaining to the constitution in its various meanings. Although constitutionalism can take different forms, its main and common claim is that political and legal power should be exercised only within the limits of a constitution, such as the separation of powers, checks and balances, the rule of law, democracy, and fundamental rights. Legal pluralism, by contrast, is not always a political theory, and may be used to describe a legal reality, usually to escape the monism/dualism opposition in capturing the validity of postnational law within domestic law.<sup>3</sup> When used as a political theory, moreover, it is not used to oppose constraints on political and legal power. It refers to the equivalence of authority of legal norms stemming from different legal orders or regimes and the absence of hierarchy between them.

There is nothing, in other words, to prevent each set of legal norms in a pluralist setting to be organized constitutionally and for political and legal power within them from being exercised within certain limits. If the sets of legal norms at stake are organized constitutionally, their relationships are ones not only of legal pluralism but also of constitutional pluralism. And if there were a hierarchically superior legal order or set of legal norms, it is likely that it would be constitutionalized too. Those international constitutionalists who claim there is such a superior legal order or set of legal norms do not endorse legal pluralism, but not all international constitutionalists make or need to make that claim, not least because of the changes that have occurred since 1945 within domestic constitutional frameworks.<sup>4</sup>

In short, therefore, constitutionalism and legal pluralism *qua* political theories capture different but parallel questions and ought not be opposed to one another. One of them refers to the limits on political and legal power and the other to the organization of power in the first place. Legal pluralism is best opposed therefore to monism and dualism as theories not only of legal validity but also of authority (see, e.g., 242) and maybe to the idea of law *qua* unitary legal system (see actually 305-306). And this brings us back to the first of my previous general remarks.

That false opposition between constitutionalism and pluralism actually glosses over the central issue in the debate: the subject(s) of both the plurality of legal norms at stake and the plurality of corresponding constitutional constraints. It is

<sup>3</sup> On those various conceptions of legal pluralism, see Besson, 'Legal Pluralism'.

<sup>4</sup> Contrast, e.g., Fassbender, B., "We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press 2007), p. 269, with J. Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press 2010), p. 261-280. For a democratic argument in favour of constitutional pluralism, see Besson, 'Whose Constitution(s)'.

not a matter of choosing the one over the many or *vice versa*, but of explaining who the many are and how they ought to relate in the absence of ultimate authority of the constituted orders. Presumably, moreover, the fact that some of those polities are constitutional democracies does affect the way they ought to relate to each other. For instance, some constitutional principles may be shared between them without belonging to an overarching constitutional order. In that sense, some pluralist constitutionalist theories, misguidingly referred to as ‘accommodationists’ in the book (75, 77), are disparaged a bit too quickly.

*The democratic argument for pluralism*

The questions of the subject and of political legitimacy actually appear later, in the third part of the book, where the author develops his democratic argument for pluralism. Most of the time, however, the question is simply mentioned without much detailed treatment.

To start with, Krisch assumes the existence of a plurality of distinct subjects corresponding to a plurality of sets of legal norms. It is not clear, however, why the same or partly the same subjects could not be subjected to independent or partly independent sets of legal norms. It would be interesting to have an argument as to why legal pluralism implies political and especially democratic pluralism, as it were. And this in turn requires discussing the concepts of law and legal order, and that was the object of the first of my general remarks.

Moreover, the author does not provide a detailed argument as to who those democratic subjects could be (101-103, 269-270). His references to individual ‘public’ autonomy and to individual citizens’ ‘acceptance’ (24, 96) are almost exclusively focused on the individual. They gloss over not only the question of the ‘collective’ in which those individuals ought to be equal to one another (103) and in what way,<sup>5</sup> but also the question of the boundaries of that group or polity. It is not enough to invoke the paradox of democratic boundaries in reply to that objection (93-95), however, as that paradox refers to the origins of any given democratic polity and not to the transition from one democratic polity to a different or more encompassing one. Nor is the reference to deliberation (104) and to ‘polycentric and contestatory models of democracy’ (56) enough to evade the question of whose polity is at stake, except maybe in an entirely agonistic model of democracy. At times, moreover, Krisch refers to the ‘global polity’ and ‘international society’ (59), seemingly indicating that there is already a global democratic subject

<sup>5</sup>The author seems to endorse the all-affected principle (e.g., 298), but no specifics are given as to kind of interests or stakes in consideration and their required degree of affectedness, and no normative defence of that principle is to be found in the book.

in place, albeit a divided and deeply diverse one as follows from his analogy to diverse domestic politics (61, 305).

Finally, there is a sense in which legal pluralism could be just as anti-democratic as democratic. One could have legal pluralism in a non-democratic regime. Or one could imagine legal pluralism as a factor of erosion of democratic regimes. What comes to mind here to protect democracy is constitutionalism, of course, and the real challenge again is explaining how constitutional or tamed pluralism could work between the legal orders of constitutional democracies or between them and other sets of norms (see actually 285-286 on free-standing 'interface norms'), rather than trading constitutionalism for pluralism.<sup>6</sup>

### *Human rights pluralism and legal pluralism*

As one may expect, the democratic question brings in its wake the human rights issue. Interestingly, and not surprisingly given the connection he makes between legal and political pluralism and between political pluralism and democracy, the author uses human rights as the primary example of postnational legal pluralism.

Again, it may be useful, before focusing on legal norms, to look at the subjects of those human rights norms. It is clear from the example of the European Convention of Human Rights (ECHR) that there is only one kind of polity at stake whose individuals' human rights are concerned by the ECHR: that is each of the forty-seven domestic polities in the Council of Europe. There is no plurality of democratic subjects in this context (*contra* 111). Human rights norms are very different, therefore, from the other legal norms used as evidence in the book.

Nor are human rights norms themselves plural to the extent that – although ECHR rights share the same scope and content as domestic human rights – their role is different and complementary, and their relationship, as a result, is not one of competition. ECHR rights constitute minimally entrenched guarantees sanctioned by the interpretations and decisions of the European Court of Human Rights (ECtHR), and to that extent they take priority over domestic decisions. The fact of judicial pluralism need not be conflated with that of legal pluralism.

True, as Krisch explains, albeit by reference to the ECtHR's decisional authority, ECHR rights are interpreted by the ECtHR in cooperation with domestic courts and following a European consensus (143). In the absence of such a consensus, domestic interpretations are protected by the margin of appreciation. Besides this form of interpretative or substantive subsidiarity, one may also men-

<sup>6</sup> See for such an attempt, e.g., Erman, E., 'Should All Political Contexts Be Democratic? Contours of a Two-Faced Theory of Legitimacy', in E. Erman and S. Näsström (eds.), *Political Equality beyond the State* (2012, forthcoming); Christiano, T., 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press 2010), p. 119-138.

tion the procedural subsidiarity and remedial subsidiarity of the ECHR regime and the priority of domestic remedies both before and after a ECtHR decision. What this shows, however, is not the coexistence of a plurality of non-hierarchical human rights norms, but, on the contrary, the deeply indeterminate nature of international human rights and the importance of their renewed specification in the domestic context before being consensually and minimally entrenched internationally again.

If that mutually validating and legitimating relationship between international and domestic human rights<sup>7</sup> also belongs to the kind of legal pluralism Krisch has in mind, then it may have been interesting to read more in the book about the kinds of legal norms and the kinds of relationships between them that may qualify as instances of legal pluralism (226-234). The fact that 'individual rights' are listed among what Krisch refers to as the 'interface norms' applying to relationships between different legal 'layers' (295) does indicate, however, that the relationship between international and domestic human rights cannot simply be explained along the same lines as any other instance of legal pluralism.<sup>8</sup>



<sup>7</sup> See, e.g., Besson, S., 'Human Rights and Democracy in a Global Context – Decoupling and Recoupling', 4(1) *Ethics and Global Politics* (2011), p. 19-50.

<sup>8</sup> See, e.g., Besson, S., 'Human Rights and Legal Pluralism', in M. Maduro and K. Tuori (eds.), *Rethinking Transnational Law* (Cambridge: Cambridge University Press 2012, forthcoming).