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Dystopian legalities: A reply to Nico Krisch

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As its title indicates, this is a reply of sorts to recent work by Nico Krisch, published in this issue. The notion of entangled legalities, I argue, shows considerable analytical promise, much like the notion of inter-legality as developed by my colleague Gianluigi Palombella and myself a few years ago. Both may help us understand how large chunks of contemporary law works. Where Krisch's approach departs from ours is in his background assumptions and his chosen actorial perspective: his interest resides mainly with the regulator. In this reply, I zoom in on some of the consequences this may have.

1. Introduction

It is not easy to formulate comments on an article that is mostly persuasive and compelling.[1] Having been preoccupied with some of the same concerns over the last couple of years,[2] and having long realized a similarity in outlook between Nico Krisch and myself, I can only admire his clarity of thought and expression. It is probably fair to say that I am mostly persuaded by Krisch's analysis; such differences as exist between us relate mostly to background factors, it would seem, such as the depiction of the intellectual setting or the focus of our studies. It is this sort of thing that I will explore in what follows.

2. Non-entangled Legalities?

The background condition of Nico Krisch's concept of entangled legalities (or legal entanglements) is the idea that, for much of the twentieth century, law was neatly divided into territorial systems, with the relations between those systems governed by international law. Things were clear; divisions were clear; and legal relations were clear. Within those national systems, official state law reigned supreme, while between and among those national systems, there was public international law, with private

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1 Nico Krisch, *Entangled Legalities in the Postnational Space*, 20 Int'l J. Const. L. 476 (2022).

2 *See* The Challenge of Inter-legality (Jan Klabbers & Gianluigi Palombella eds., 2019).

international law being invented to address private relations with transboundary elements. Krisch suggests that this clarity was perhaps best exemplified in the work of Kelsen, who posited a monist concept with a clear *Grundnorm* and hierarchy of norms: "Whatever multiplicity existed here," writes Krisch, "it was theoretically tamed."[3] Where the legal world was thus for a long time orderly and well organized, so Krisch intimates, developments over the last few decades have disturbed this pastoral picture, and today's world is characterized by overlapping, crisscrossing, and intersecting legal systems and legal rules. The notion of entangled legalities then, so he suggests, can help to make sense of the current situation.

Krisch's is an attractive construction, suggesting an enviable orderliness and a neat solution, but the reading of nineteenth-and twentieth-century jurisprudence on which it is based is not the only possible reading. An alternative reading might suggest that much legal theory was actually concerned precisely with overlaps and multiplicities. The very attempt to define "law," whether by Austin or, much later, Hart or Fuller, only makes sense against a background of possibly competing notions, with other systems of norms (even Austin's "positive morality"[4]) vying for prominence and attention and, perhaps, supremacy. Here one can think of morality, but think also of social rules, tribal rules, or religious norms. Official state law (apologies for the somewhat pedestrian language. . .) may have proclaimed its own supremacy, but remains constantly challenged, both within states and among states.

Kelsen's monism was far from the final answer to overlaps and competition, and neither was Triepel's dualism.[5] In fact, for much of the twentieth century, it is precisely this picture of orderliness that is being questioned. This questioning took the form of practical occurrences such as the emergence of the individual as holder of rights or obligations directly under international law, or the possibility of treaties working directly in domestic legal orders, already acknowledged by the Permanent Court of International Justice in the 1920s.[6] It manifested itself in puzzles such as those thrown up by the emergence of international instruments other than treaty or custom (the legal nature of the Mandate, for example, haunted the International Court of Justice on half a dozen occasions), or the emergence of actors other than states claiming some normative authority (international organizations most of all, but not only). And famously, curiously missing from Krisch's discussion, Philip Jessup recognized in the 1950s that some legal transactions defy categorization as either domestic or international law, coining the label "transnational law" to describe the situation.[7] If such a narrative would be considered plausible, then much of legal theory

[3] Krisch, *supra* note 1, at 482. *See also* Hans Kelsen, Introduction to the Problems of Legal Theory (Bonnie Litschewski Paulson & Stanley Paulson trans., Clarendon Press 1992).

[4] John Austin, The Province of Jurisprudence Determined (Wilfred Rumble ed., Cambridge Univ. Press 1995) (1832). It is, among international lawyers at least, well known that Austin dismissed international law as merely "positive morality." What is less often realized is that he never doubted its binding force.

[5] Heinrich Triepel, Völkerrecht und Landesrecht (1899).

[6] Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion, 1928 P.C.I.J. (ser. B), No. 15, at 282.

[7] Philip C. Jessup, Transnational Law (1956).

from the nineteenth century onwards is an attempt not so much to figure out what law is in isolation, but precisely an attempt to figure out how normative utterances, legal rules, and legal systems relate to each other. On such a reading, law (at least the law we speak of when speaking in general terms about legal orders or systems) is, by definition, a relational idea, whether in the guise of legal pluralism, or constitutional pluralism, or normative pluralism, or interlegality or, indeed, legal entanglements.

3. Beyond Pluralism?

Krisch's notion of entangled legalities is developed at roughly the same time as the rejuvenation of Santos's notion of interlegality in which I have been involved.[8] Both are relatively (always "relatively") free of normative baggage, in ways that do not quite apply to concepts such as legal pluralism. The latter is usually associated with relations between official state law and the law of particular communities within that state; it was developed with a view to explaining how tribal law or indigenous law could coexist with official law or even, in colonial settings, with law stemming from the metropolitan state.[9] Put like this, legal pluralism came with an agenda, tapping into the authentic souls of local communities and protecting these against the distant commands from the state, whether in a colonial setting or otherwise.

Much the same applies to constitutional pluralism, at least in some formulations,[10] explaining how in modern states with impeccable liberal credentials nonetheless there could be room for indigenous or sub-federal self-expression and even a degree of autonomy or self-determination. The notion was then transplanted to the EU setting, explaining either how an EU constitution could coexist with domestic constitutions without threatening these, or how domestic constitutions could coexist with an EU constitution without threatening the latter.[11] Either way, both the notions of legal pluralism and constitutional pluralism work against a background of identifiable political groups, and somehow suggest political struggle.

This does not apply in quite the same way to our notion of interlegality or Krisch's concept of entangled legalities. These follow the more amorphous approach of Jessup, identifying overlaps and intersections that run deeper and are broader than those identified by pluralists. For both Krisch and for Palombella and myself, it is not just the case that the EU may clash with domestic law, or that domestic law may clash with tribal law. Instead (and here normative pluralists may agree), normative suggestions and commands come at all of us from a wide variety of directions.[12] Athletes may have to abide by sports rules, which may or may not qualify as "law." Social groups may

[8] The Challenge of Inter-legality, *supra* note 2.

[9] Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 Law & Soc'y Rev. 719 (1973).

[10] James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995).

[11] Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (1999).

[12] *See also* Normative Pluralism and International Law: Exploring Global Governance (Jan Klabbers & Touko Piiparinen eds., 2013).

entertain dress codes and codes of propriety, which in some places may become official law. Religious leaders suggest what to them counts as desirable behavior, which may or may not be seen law or competing with law. Professional standards may tell us how to behave in the workplace, while "influencers" (*nomen est omen. . .*) suggest what the good life looks like: Kim Kardashian replacing Aristotle. Amid all this, it is unclear what exactly counts as "law," what authority this "law" is based on, and what happens when various commands clash or when plural systems clash: why is it that the athlete convicted by a sports governing body of using performance-enhancing drugs can find solace in the law? Why is it that, sometimes, criminal law occupies itself with athletes who have already been punished by their sports governing body, and how does this relate to the double jeopardy idea? Both our interlegality approach and Krisch's entangled legalities approach therewith acknowledge that the world is a complicated place, more complicated perhaps than a focus on the mere coexistence of legal orders would suggest.

4. Perspectives?

Assuming that the "view from nowhere" is a philosophical impossibility, legal studies will stem from somewhere. This "somewhere" can be a normative proposition or an empirical riddle or a combination of both, but something is thought to inspire the work, and give it a sense of direction. For a socio-legal scholar like Santos, developing the notion of interlegality, there was a clear normative inspiration. He felt that the overlap between legal orders that he had observed created space for the disenfranchised to exploit: they could go "forum-shopping," strategically identify the legal order most receptive to their plight.[13] And without going to great depths, it would seem that this basic idea of interlegality was tacitly accepted by those writing later, most importantly Fischer-Lescano and Teubner, also best known as socio-legal scholars perhaps.[14]

Palombella and myself, working in different traditions than the socio-legal (Palombella is mostly a legal theorist; my own professional habitat is mostly public international law), were inspired to borrow and re-work the idea of interlegality by an empirical puzzle. How is it possible that courts sometimes seem to take rules and injunctions from other legal systems into account without paying too much attention to notions of monism or dualism? After all, like so many, we were brought up to think that contacts between overlapping legal orders tend to be governed by such formal notions, functioning as gatekeepers. But then the Court of Justice of the European Union came up with its well-known *Kadi* jurisprudence, ultimately difficult to explain in traditional terms.[15] Upon reflection, moreover, the CJEU had flagged a similar disregard for traditional ideas about relations between legal orders and hierarchy in earlier

[13] Boaventura de Sousa Santos, Towards a New Legal Common Sense (2d ed. 2002).

[14] Andreas Fischer-Lescano & Gunther Teubner, Regime-Kollisionen: Zur Fragmentierung des globalen Rechts (2006).

[15] Joined Cases C-402/05 P and 415/05 P, Kadi and Al Barakaat v. Council and Commission, ECLI:EU:C:2008:461.

decisions, e.g. when deciding on the consumer rights of air passengers in *IATA and ELFAA*.[16] And some time later, the European Court of Human Rights presented its *Al-Dulimi* decision, combining human rights law and international law and UN law and Swiss law so as to protect an individual against sanctions.[17] Here was something interesting going on: two prominent international tribunals ignoring formalities in difficult cases, and aiming to do justice in the cases before them. This piqued our curiosity, so much so that in the resulting volume we went looking for further examples, increasingly zooming in on courts as hubs of interlegality and the accompanying demands this places on judges, and generally delimiting our approach to interlegality as something that creates a challenge for judicial bodies.

Krisch entertains a different idea. He is not, it seems, particularly interested in what courts do. This is fine, of course, perhaps even welcome, as legal scholarship is too often limited by focusing on courts, at the expense of other actors. Palombella's and my interest was piqued by judicial practices and thus this is where the focus came to rest, but there is more to life, even legal life, than courts alone. Krisch's interest resides elsewhere, mostly, it seems, with the abstract subject of the law and techniques employed by regulators: he paints with a broad brush, and does so "sans peur et sans reproche." He almost offers a view from nowhere, perhaps seduced by the comprehensive notion of entanglements. Zygmunt Bauman once observed that one of the hallmarks of a "network" is that you can never tell where it begins or where it ends, who is part of it, or how it can be joined or left behind.[18] Something similar seems to apply, in terms of linguistic association, to the metaphor of the "entanglement": it can be everywhere and nowhere, encompass everyone and no one in particular, and can work in various mysterious ways.

That Krisch paints with a broad brush is no doubt on purpose: he notes somewhere that he casts the net wide, and, clearly, he does not want to worry about such questions as whether certain norms are "really law" or something else. That is probably wise, if only to prevent digressions, but it is not fully innocent: to refer to "entanglements" as "*legal* entanglements" or "entangled *legalities*" (as he does) when discussing the interaction between different sets of rules creates at the very least a presumption that the rules under discussion are legal rules. There is a lot to be said for that presumption (as I would be the first to acknowledge),[19] but some might feel it insufficiently recognizes the extra-legal, especially the intentionally extra-legal, exemplified by such notions as "soft law" or "non-legally binding agreements."

[16] Case C-344/04, IATA and ELFAA v. Department of Transport, ECLI:EU:C:2006:10. For brief discussion, see Jan Klabbers, *The Reception of International Law in the EU Legal Order*, *in* Oxford Principles of European Union Law 1208 (Robert Schütze & Takis Tridimas eds., 2018).

[17] *See* Al Dulimi and Montana Management v. Switzerland, App. no. 5809/08 (June 21, 2016), https://hudoc.echr.coe.int/eng?i=001-164515.

[18] Zygmunt Bauman, Liquid Love: On the Frailty of Human Bonds at xi–xii (2003).

[19] *See* Jan Klabbers, *Law-making and Constitutionalism*, *in* Jan Klabbers, Anne Peters, & Geir Ulfstein, The Constitutionalization of International Law 81 (2009).

If the discussion of entangled legalities seems to start from the abstract, non-identified subject whose life is governed by a wild variety of norms, the discussion of techniques changes register: these owe more, it seems, to the regulator's perspective. By and large, Krisch distinguishes three types of norms that govern relations between legalities. There are the reception norms, such as monism and dualism, accompanied by the sort of norms with which legal systems can protect themselves, such as *ordre public* considerations. Second, there are overarching norms, such as hierarchy norms which mostly apply within rather than between different systems, and conflict norms (such as *lex specialis*) which may apply in the interstices. If all this sounds quite familiar, it provides nonetheless a useful re-description of the familiar, accompanied by the more novel realization that there are also straddling norms, functioning much like transmission belts (Krisch speaks of "transmission systems") and mostly consisting of open-ended principles, such as due diligence, good faith, or the protection of legitimate expectations. Where Dworkin already held that these may complement rules within legal systems, in a way reflecting social standards, Krisch does something similar when he assigns them also the function of transmission belts within systems—and in doing so he comes very close to Palombella's and my notion of interlegality, though without specifying a particular role for courts. This comes towards the end of the article, and perhaps inevitably so, when he discusses how a landscape of entangled legalities can be navigated.

Krisch is surely right when he opines that entanglement "is a central feature of contemporary law."[20] Ever since Jessup wrote in the 1950s, only the most parochial lawyer can find this unpersuasive or controversial. Where Krisch strikes a more controversial chord is his suggestion that the structure of "postnational law" (his term[21]) encompasses all sorts of norms, legal and extra-legal or, as he puts it in language reminiscent of the social sciences, "looser assemblages of norms and normative practices."[22]

5. Towards Dystopia?

Still, on reflection, the most controversial aspect of Krisch's article may well stem from its nigh-on dystopian overtones. What comes out, at the end, is a world made up of people doing their thing, actors following their interests, regulators aiming to do what they ought to do, but without anyone having much of an idea as to what happens, or who does what to whom. In such a world, no one is in control, and where no one is in control, no one can be held to account. It is scarcely a coincidence that Krisch, once at the vanguard of a popular approach to accountability,[23] does not address such issues

[20] Krisch, *supra* note 1, at 505.

[21] He has used it before, and to good effect: *see* Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (2010).

[22] Krisch, *supra* note 1, at 506.

[23] *See* Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Prob. 15 (2005).

here, and uses judicial decisions mostly as illustrative materials. His is a bleak world populated by unidentifiable, faceless people (mostly "regulators") somehow taking decisions, without public discussion. They need not even be "experts," it seems: the article does not use the vocabulary of expertise; the closest it comes in discussing actual people is when speaking of entangled legalities being brought about by the acts of "governments, regulators, judges, litigants, and societal actors."[24] This is both comforting and distressing: it is comforting in that there seems to be no need for conspiracy theorizing—but it is distressing for exactly the same reason.

Writing in the early days of "global governance," in the 1990s, political theorist John Gray dismissed the thesis that global governance was being exercised, or could be exercised, by big multinational companies: these, after all, merely have to follow the demands and commands of the markets on which they operate, and markets follow their own logic.[25] That was scary: it suggested no one was in control. Krisch's notion of entangled legalities provokes in me much the same response.

[24] Krisch, *supra* note 1, at 498.

[25] John Gray, False Dawn: The Delusions of Global Capitalism (1998).