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REVIEW ESSAY

The Limits of Legal Pluralism

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Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2010, 358pp., ISBN-13 978-0199659968, €85.99 (hb).

1. INTRODUCTION

Although legal pluralism comes in many guises, it seems to have found a whole new spirit within the realm of public international law.[1] In this field, it has been used first in a descriptive sense to capture the fragmenting international legal order[2] or to exemplify the coexistence of law stemming from different legal orders in one legal system.[3] However, increasingly, legal pluralism is considered from a normative stance and heralded as a way to come to grips with a changing (legal) world.[4] In his book, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Nico Krisch follows this pluralist path in a challenging fashion. In this eloquently written and well-documented book, Krisch embraces legal pluralism as a promising way to deal with 'postnational law' that is characterized by an international legal order in which 'the centre of gravity ha[s] shifted away from the nation-state'.[5] The legal pluralism that is favoured by Krisch lacks an overarching hierarchical structure and contains a mutual openness of different legal systems. Most importantly, Krisch's vision breaks with the focus on a common point of reference (a *Grundnorm*) in international law, which renders the question of where authority ultimately lies more elusive. His approach amounts to an abandonment of positivism, deliberately shattering the aim of constitutionalism at the international level.[6]

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1 See, e.g., D. Halberstam, 'Local, Global, and Plural Constitutionalism: Europe Meets the World', in J. H. H. Weiler and G. De Burca (eds.), *The Worlds of European Constitutionalism* (2011), 150; B. Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', (2008) 30 Syd. LR 375; R. Michaels, 'Global Legal Pluralism', (2009) 5 *Annual Review of Law and Social Science* 243.

2 See, e.g., M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission', UN Doc. A/CN.4/L.682 (2006); A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2003–04) 25 Mich. JIL 999; K. Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap', (2003–04) 25 Mich. JIL 1159.

3 On this, see Tamanaha, *supra* note 1; Michaels, *supra* note 1.

4 N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010); Halberstam, *supra* note 1.

5 Krisch, *supra* note 4, at 6.

6 Already captured by M. Koskenniemi in *From Apology to Utopia: The Structure of International Legal Argument* (2006).

Krisch's answer to the 'global disorder of normative orders'[7] that law is today goes beyond that of other advocates of legal pluralism like Daniel Halberstam and Miguel Maduro, who still speak of plural constitutionalism and constitutional pluralism.[8] Krisch lifts constitutionalism altogether, not only horizontally – between fields in the highly fragmented international legal order – but also in the vertical relationship between national, regional, and international law. This essay will mainly focus on the vertical relationship between different layers of law, since that is where Krisch's pluralist theory has the most serious drawbacks, although most of the criticism holds for the horizontal level as well. The question is whether the interaction between the international legal order and the national or regional legal order should still rest on a hierarchical structure (even if it does not function perfectly) or whether it, as Krisch contends, should dismiss constitutionalism and embrace pluralism. By scrutinizing Krisch's arguments and case-law examples, I will go into the dangers of *fundamentally* accepting this form of legal pluralism.

2. Lifting constitutionalism

According to Krisch, legal pluralism is the only true answer to the questions raised by the era of postnational law that we have now entered. In his view, there are three possible reactions to the increase in and proliferation of international decision-making that has deprived the state of its monopolist position in international law: containment, transfer, and break.[9] Containment 'combines a vision of threat and a prospect of continuity'.[10] It wants to keep the focus on national decision-making, where sovereignty and authority ultimately lie with the state. Democracy (parliamentary control) and constitutionalism are the most important reasons to retreat to state sovereignty. It is unfortunate that Krisch pays so little attention to containment, under whose umbrella we can easily put some of the decisions that he labels as pluralist (see below). It is hard to disagree with the statement that containment in the form of domestic constitutionalism 'risks being underinclusive and insufficiently effective' but, at the same time, it is one of the most probable reactions to the increasingly complex nature of international law.[11] While it might not be a normatively appealing way to proceed, recovering national autonomy is a strong element in present national politics, which inevitably has its effect on judicial decisions.[12]

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7 N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2008) 6 *International Journal of Constitutional Law* 373.

8 M. Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Adjudication in the Context of Legal and Constitutional Pluralism', in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 356; Halberstam, *supra* note 1.

9 Krisch, *supra* note 4, at 14–22.

10 Ibid., at 14.

11 Ibid., at 21.

12 Take, for instance, the reactions of the United Kingdom to the implications of the *Hirst* case (ECtHR, Judgment of 30 March 2005, *Hirst v. The United Kingdom (No. 2)*) in which the United Kingdom was urged to abolish the voting prohibition for prisoners. Many MPs protested against the 'the British submission to foreign judges' and the alleged infringement of sovereignty; see, on this controversy, 'Prisoners' Voting Rights: Britain's Mounting Fury over Sovereignty', *The Economist*, 10 February 2011, available at

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The second reaction to postnational law and governance distinguished by Krisch is transfer. This entails the transfer of concepts of legitimacy – such as democracy, accountability, constitutionalism, and the rule of law – from the national to the international level.[13] For a long time, constitutionalism was regarded as the preeminent way to create a comprehensive framework of law at the international level (an international rule of law).[14] Nonetheless, Krisch concludes that 'it may turn out that constitutionalism is not made for the postnational context'.[15] Although it may work well for nations with a uniform composition of people, Krisch contends it 'will be less suited for the radical diversity that marks the global populace'.[16] Krisch is right that fully fledged constitutionalism at the international level will always remain a utopian desire, but this impossibility has been captured before.[17] Whether this means that the whole constitutionalist project should be dismissed and that we must 'explore alternative visions of politics . . . and look beyond constitutionalism' is another question.[18] This is nevertheless the normative path that Krisch decides to take.

Krisch sides with a third possible approach to postnational law: break. The aspect of break is visible in two elements that are present in the other two approaches: democracy and constitutionalism. First, break means:

> a decoupling of legitimacy concerns from democracy as such, either through an emphasis on output over legitimacy, through an exploration of non-electoral accountability mechanisms, or more broadly through a focus on accountability as a mix of relationships that does not necessarily find its anchor in democratic terms.[19]

And, second, 'advocates of a "break" eschew constitutionalism's emphasis on law and hierarchy and propose more pluralist models, which would leave greater space for politics in the heterarchical interplay of orders'.[20]

So, here, we have a legal pluralism that overtly abandons constitutionalism, in the sense of both (electoral) accountability and the aspect of hierarchy. In a sense, it even leaves behind 'legality' as we have come to know that concept. To underpin his choice of a radical form of legal pluralism, Krisch presents several virtues: first, legal pluralism keeps better pace with reality than does constitutionalism, since the loose norms make *adaptation* easier; second, because of the elements of disruption and openness, 'a pluralist order may provide greater contestatory space for weaker actors' (*contestation*); and, third, it may provide for *checks and balances* that are lacking at the international level.[21] These three advantages can be easily rebutted, which

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www.economist.com/blogs/bagehot/2011/02/prisoners_voting_rights; think, in the same vein, about the French and Dutch dismissal of the European Constitution.

13 Krisch, *supra* note 4, at 15–16, 27–68.

14 See, e.g., Sir A. Watts, 'The International Rule of Law', (1993) 36 GYIL 15; P. Allott, *Towards an International Rule of Law: Essays in Integrated Constitutional Theory* (2005).

15 Krisch, *supra* note 4, at 38.

16 Ibid., at 68.

17 E.g., Koskenniemi, *supra* note 6.

18 Krisch, *supra* note 4, at 68.

19 Ibid., at 16–17.

20 Ibid., at 17.

21 Ibid., at 78–89.

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is partly admitted by Krisch.[22] Adaptation has a clear destabilizing downside, as does contestation. Furthermore, contestation and checks and balances can also be achieved through containment (although in a more rigid way). Therefore, Krisch presents his fourth argument, namely that 'plural, divided identities, loyalties, and allegiances that characterize postnational society are better reflected in a multiplicity of orders than in an overarching framework that implies ultimate authority'.[23]

This has an appealing side, first because we can finally get rid of the doomed project of international constitutionalism, and second because it brings in democracy through the backdoor, although this is a democracy of a more deliberative nature – one of mutual accommodation and openness. But is it a feasible idea? And how will this legal pluralism work out in practice? According to Krisch, claims of 'collectives/polities/*demoi* should find recognition and consideration by others only if they have a sufficient basis in the public autonomy of citizens – both in terms of links to citizens within the respective polity and of inclusiveness towards affected outsiders'.[24]

This already illustrates the slippery slope we find ourselves on if we take pluralism as a normative starting point for decisions regarding colliding norms. To be clear: this would mean that we must first decide whether a court decision obtains enough recognition from the collective it represents (e.g., the European Union or the Netherlands) and subsequently if it is sufficiently representative of the international community. Whereas we might be able to make a determination regarding the first question, the second is a harder catch. Were we to fundamentally accept this democratic quality as a norm that can set aside, for instance, a decision of an international organization, international politics would become like a marketplace in which he who yells loudest gets what he wants. Clearly, this is not exactly what Krisch means and especially not what he strives for. In his view, the international legal order should become more deliberative, with more mutual openness, which can do better justice to the pluriform nature of the international community. It is, however, hard to see how this can happen if there are no hard guarantees in the form of legal norms that protect the interests of the different actors, especially the weak ones. Here, we arrive at one of the most fundamental criticisms of Krisch's normative plea for pluralism: the positive examples of pluralism he describes do still, and can only, take place against the background of a hierarchical system with solid legal rules.

Krisch is right that constitutionalism can induce a static situation that can lead to an unpleasant status quo, the most obvious example being the position of the five permanent members of the UN Security Council (UNSC). On the other hand, the UNSC has served at least as a stable institution that still exists and is – whether one likes it or not – more active than ever. In that sense, the fact that its structure and functions were very clearly written down has had its advantages. At the same time, the UNSC has found ways to stretch its mandate *within* the constitutional

22 Ibid., at 81, 84–5.
23 Ibid., at 103.
24 Ibid., at 275.

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framework of the UN Charter (whether it has in fact overstretched it is another matter). This reflection might be a bit off the point, since I will mostly discuss the vertical relationship between domestic and international law, but it constitutes a relevant illustration of the role of firm constitutional rules. It shows that constitutionalism can lead to both flexibility and inflexibility. Obviously, this has much to do with interests. The UNSC had an interest in stretching the limits of its Chapter VII powers, to become better equipped for its tasks and to react to new developments that threatened international peace and security (such as global terrorism). At the same time, national interests prevented the conversion of the procedural rules of the organ. In this regard, the problem is the lack of flexibility that was laid down in the rules of procedure: it is impossible to change the composition of the UNSC as long as one of the permanent members has a right of veto. So, the mistake was made with the creation of that rule. Constitutionalism is thus not inflexible in itself, but it can become inflexible if it contains inflexible rules.

To bring this back to our subject, if a domestic court is confronted with inflexible or unjust rules, it might be necessary for this court to make clear the flaws of the rule. By doing that, the court can take an *external* approach, which means that it – for very exceptional reasons – steps out of the formal hierarchy and chooses a perspective based on a certain quality.[25] The court thus chooses to abandon the *internal* approach, which would entail a strict application of formal rules of hierarchy.[26] The most prominent case in which the external approach was applied is the *Kadi* ruling of the European Court of Justice (discussed more extensively below), in which the court protected human rights despite the clear hierarchical structure provided by the UN Charter. It is this form of legal pluralism that is favoured by some authors, who recognize the important check it can provide on decisions made by international organizations.[27] These authors do not abandon constitutionalism; they simply advocate a more flexible version of it. This is, however, not what Krisch strives for, since his form of legal pluralism is principally unsettled and abandons constitutionalism to a much higher extent. It is questionable whether this will ultimately lead to more flexibility and accommodation, as he claims. In my view, it is more obvious that abandoning constitutionalism will lead to more containment.

3. Pluralism or containment?

As noted above, the approach of containment – back to national sovereignty – is dismissed by Krisch. He is right that containment is from a normative point of view not an appealing way to deal with the increasing internationalization of

25 In a way, it could be seen as sacrificing legal certainty for justice.

26 Maurice Adams and Willem Witteveen have recently made the same sort of distinction between an *institutional perspective*, which is focused on formal hierarchic norms (who has ultimate sovereignty?), and a *material perspective*, which is focused on the quality of norms, in M. Adams and W. Witteveen, 'Gedaanteverwisselingen van het recht', (2011) 86 *Nederlands Juristenblad* 540.

27 See, e.g., E. Benvenisti and G. Downs, 'Will National Court Cooperation Promote Global Accountability? The Judicial Review of International Organizations', manuscript, 2009; Halberstam, *supra* note 1; Poiares Maduro, *supra* note 8.

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law and politics. However, this ignores the fact that containment can also be an element of pluralism and might become even more prevalent if legal pluralism fully replaces constitutionalism. At the same time, it is very probable that the aim of a more constitutionalist and accountable international legal order will lead to less containment. How to explain this?

As will become clear in the next section, some of the decisions that are presented by Krisch as legal pluralist contain a high degree of containment. For instance, in the *Ahmed and Others* case, the UK Supreme Court ultimately urged Parliament to decide on the implementation of the counterterrorism resolution – a retreat to national democracy.[28] In the *Kadi* case, the decision was defended by reference to the autonomous European legal order.[29] If an international decision does not satisfy domestic courts, they refer to their own jurisdiction: this might be plural, but it is also containing. What would happen if we were to agree with Krisch and commit ourselves fully to legal pluralism at the expense of constitutionalism? The result would be less clarity on the rules of hierarchy and therefore more freedom for national courts to take an external approach. Aiming for more constitutionalism and democratic accountability, on the other hand, might not totally achieve full democratic accountability and other state-like virtues at the international level, but it is likely to lead to improvement. At this moment, democratic accountability is one of the fundamental problems of international law and especially international organizations. Many of the national court decisions that set aside international law are based on this argument.[30] Providing for clear legal rules and better accountability could thus only lead to less ammunition for containing attitudes.

Krisch's outright choice for legal pluralism differs from the more careful approach of other pluralist thinkers like Halberstam and Maduro, who still see a role for constitutionalism.[31] He transcends constitutionalism and searches for a new way to deal with international law, also regarding the interaction between national and international law. The largest problem with Krisch's thesis is that he seems to substitute constitutionalism for legal pluralism altogether, while legal pluralism could work perfectly within constitutionalism. Krisch gives relevant examples of legal systems that are mutually open – such as the European Court of Human Rights (ECtHR) and its 'member courts'.[32] Yet, like the European Union, the claim of the ECtHR is also solidly based on a treaty, and the relationship between the ECtHR and the member states has developed over more than 60 years against the background of a firm hierarchical system. By putting so much emphasis just on the openness and not on the underlying hierarchical system, Krisch forgets to take note of the negative effects of an absolute choice for legal pluralism.

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28 *Her Majesty's Treasury v. Mohammed Jabar Ahmed and Others*, [2010] UKSC 2.

29 Joined Cases C-402/05 P and C-402/05, *Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] OJ C285/2.

30 See Benvenisti and Downs, *supra* note 27.

31 See Halberstam, *supra* note 1; D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in Dunoff and Trachtman, *supra* note 8, 326; Poiares Maduro, *supra* note 8.

32 See Krisch, *supra* note 4, at 109–52.

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According to Krisch, the newly fledged practice of national and semi-national courts reviewing decisions of international organizations proves that legal pluralism is taking root – it is a *sign of acceptance*.[33] I would, however, contend that it should in the first place be understood as a reaction of national courts to an international legal order that distances itself more and more from the national realm. It is thus merely a *sign of awareness*: national courts realize that they must deal with a changing legal world and develop new ways to curtail negative effects of this internationalization. If they want to retain the central values of their constitutional system – such as fundamental rights, (democratic) legitimacy, accountability, and integrity – it is sometimes necessary to place themselves outside the formal hierarchic (constitutionalist) order that normally guides the interaction between national and international law. Deliberately, but often well disguised, they choose an external approach, not because they want to support the pluralist project, but to serve their interests: adding a democratic check[34] or reinforcing fundamental principles.[35] In general, it is a way to regain some of the authority at the national or – in the case of the European Union – regional level, and to impose checks on the executive branch of government, as you might expect from the judiciary.[36]

It would nevertheless be a mistake to take the practice of national courts as the new standard. Although we might applaud some of the outcomes, every decision taken from an external perspective is a blow to the hierarchical system. That might not be a problem – some of these decisions prove that, if this system were sacred, justice would not always be done – but we must realize that withdrawing the constitutionalist approach or standard altogether is a different matter. Still, decisions taken from an external perspective form the exception. Only in very rare cases – such as the counterterrorism resolutions of the UNSC – are decisions of international organizations clearly in conflict with fundamental norms. In general, national courts were and are perfectly able to harmonize national and international norms, if necessary by the use of tools like consistent interpretation. It must furthermore be emphasized that even the contentious *Kadi*-like decisions are taken with the formal hierarchic system in mind. The courts are very aware that they deviate from the constitutional model and are often trying to disguise this deviation.[37] This proves the importance and relevance that the constitutional and hierarchical model still has. To abandon the aim for a (strong) constitutional model to structure the international realm and to

33 Krisch, *supra* note 4; see, e.g., his chapter on the decisions regarding the UNSC resolutions, at 153–88.

34 See, e.g., *Ahmed and Others*, *supra* note 28.

35 *Kadi*, *supra* note 29.

36 See, e.g., E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by Domestic Courts', (2008) 102 AJIL 241. Benvenisti states that national courts use international law primarily for their own interest, namely 'to expand the space for domestic deliberation, to strengthen the ability of national governments to withstand the pressure brought to bear by interest groups and powerful foreign governments, and to insulate the national courts from intergovernmental pressures', at 242.

37 In *Kadi*, the ECJ stressed that the European legal system constitutes an autonomous legal order, which permitted them to take a dualist position. As such, they circumvented Art. 103 of the UN Charter (*Kadi*, *supra* note 29); in *Ahmed and Others*, the UK Supreme Court used the dualist position as well and examined whether the parliament that implemented the UN Charter in 1946 would have agreed with these specific counterterrorism sanctions. In so doing, they circumvented the obligations of the UN Charter and created the possibility of a new democratic check; *Ahmed and Others*, *supra* note 28; see also subsection 4.1.

guide the interaction between national and international law, and instead embrace a pluralist model that is non-hierarchical and, in Krisch's words, 'fundamentally open', entails a real risk that this practice becomes the rule rather than the exception. It would also legitimize reviewing on the basis of norms that might not be as 'universal' as human rights, such as national interests or religious norms.[38]

4. Legal pluralism in practice

Now that we have examined and criticized the legal pluralism proposed by Krisch, it is time to assess *if* and, if yes, *how* this pluralism works in practice. We will focus on two cases that offer interesting insights on this matter: the *Kadi* (ECJ) case and the *Ahmed and Others* case of the UK Supreme Court. Both are reactions to the widely criticized counterterrorist resolutions of the United Nations Security Council.[39] In both cases, an external approach is taken by the judiciary, but the decisions are based on different values. Furthermore, both cases are used by Krisch to underpin his argument for legal pluralism. After discussing these decisions, short attention will be paid to some other interesting case law. This section will conclude with an extension of this case law to comparable but – for many international legal scholars – less appealing outcomes of national courts taking an external perspective when they have to deal with collisions of national and international law. This will make clear what a *fundamental* embracement of legal pluralism can lead to.

4.1. *Ahmed and Others*

We can see the pre-eminent value of democracy in various UK cases. Since parliamentary sovereignty is such an important element of the British common-law system, it might lead to external decisions based on this specific element, which is clearly visible in the *Ahmed and Others* case.

In their judgment, the Lords scrutinize the legality of two terrorism Orders in Council that implemented the counterterrorism resolutions of the Security Council (because of the United Kingdom's dualist approach towards international law, the resolutions cannot be applied directly). The question is whether these orders fall into the scope of the UN Act. This Act provides for the implementation of Security Council (SC) resolutions and gives the executive branch of government the possibility to 'make such provision as appears . . . necessary or expedient for enabling [UNSC] measures to be effectively applied'.[40] In this case, the Supreme Court concludes that

38 Take, for instance, the reservations made by Islamic countries to many human rights treaties. These reservations are in a way comparable to the *Solange* approach taken by the German Bundesverfassungsgericht in the European context, which is seen by Krisch as a pluralist tendency. Both form an *ex ante* restraint on the basis of values. Legal pluralism favoured by Krisch would open the possibility of *ex post* reviewing on the basis of the same values. Examples of protection of national interests are the British *Horncastle* case (*R v. Horncastle and Others*, [2009] UKSC 14) and the *Medellin* decision of the US Supreme Court (*Medellin v. Texas*, 552 US 491 (2008)).

39 UNSC Res. 1267, UN Doc. S/RES/1267 (1999) was issued in 1999 after the bombings of the US embassies in Dar es Salaam and Nairobi and targeted at Usuma Bin Laden and the Taliban regime that provided a safe haven for al Qaeda; UNSC Res. 1373, UN Doc. S/RES/1373 (2001) was issued just after the 9/11 attack and had a wider mandate, since it considered all terrorist organizations.

40 UN Act, Art. 1(1).

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the measures are so far-reaching and imply such a great infringement of national law that they should have been democratically approved:

> There was no indication during the debates [in 1946] at Second Reading in either House that it was envisaged that the Security Council would find it necessary under article 41 to require states to impose restraints or take coercive measures against their own citizens. The question whether it would be appropriate, if it were to do so, for the Government to be given power to introduce such measures by Orders in Council in the manner envisaged by the Bill was not discussed.[41]

Consequently, since it cannot be presumed that the parliament of 1946 had envisaged that the Security Council would find it necessary to require states to take measures of this magnitude against their own citizens, the government had overstepped the boundaries of the UN Act and should have asked permission of Parliament.[42] Thus, while Article 1 of the UN Act is quite clear on the fact that the implementation of the SC resolutions lies entirely with the executive, the UK Supreme Court decides that the merits of this case should be presented to and approved by Parliament.[43] On this decision, only Lord Brown dissents. In his view, we recognize a more internal approach, since he states that the United Kingdom would violate its international-law obligations under the UN Charter if it did not implement the order. Although Lord Brown struggles with the implications of the resolution, he prefers to stay in line with the formal rules, relying not only on the UN Charter, but also on Article 27 of the Vienna Convention on the Law of Treaties (VCLT).[44]

Later, the resolutions were implemented anyway through the ratification of some new Terrorism Acts by Parliament. This judgment might thus not have had far-reaching consequences, which has tempted Krisch to call the UK case law on this subject 'little more than a warning shot'.[45] It can nevertheless be interpreted as a far-reaching warning shot. Ultimately, it leaves a new possibility for Parliament to scrutinize implementation of the SC resolutions, and consequently the resolutions themselves. If this practice were to become commonplace, it would mean that every country could – in case of far-reaching resolutions – defer the decision on implementation to their parliament. This is a potential danger to the peace and security system of the United Nations that depends on the swift implementation of resolutions. Judicial and parliamentary review could furthermore undermine the validity of the decisions and the authority of the Security Council in general. Interpreted in this way, the *Ahmed and Others* case is a potentially revolutionary judgment.

Should we interpret this judgment as pluralist, as Krisch does? It is my impression that it is in the first place a reaction to the far-reaching consequences of decisions made at the international level for the UK government and its citizens. This is visible in the following statement of Lord Hope:

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41 *Ahmed and Others*, *supra* note 28, at 16.
42 Ibid., at 45–7, 143, 173–7.
43 Ibid., at 14.
44 Ibid., at 202–5.
45 Krisch, *supra* note 4, at 164.

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> Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.[46]

These basic rules that Lord Hope is referring to are parliamentary sovereignty and the rule of law. The Supreme Court uses these important domestic values to take an external approach. But is it also a pluralist approach? It is true that the Supreme Court pays attention to different layers of law (European human rights law, international law, even Canadian case law) but, in the end, it refers to a quality of the domestic system and wants to let the terrorism order be scrutinized by national parliament. Again, there is a sign of pluralism, but not of acceptance of pluralism. This decision is better understood as a protection of essential national interests and values, and thus of containment. Only if containment were to be *part* of pluralism, which is not acknowledged by Krisch, could *Ahmed and Others* be presented as a pluralist case.

4.2. *Kadi*

Partly because of its seminal *Kadi* judgment, it is said that the ECJ has 'reinvented itself as a national court'.[47] Again, it declared the European legal order 'autonomous', this time not to ward off authority claims of national courts, but to create the possibility to distance itself from decisions of *international* organizations (a denomination the European Union has apparently transcended).[48] The ECJ departed from the approach taken by the Court of First Instance (CFI) that simply used the positive hierarchical order (the internal approach) to conclude that it could not (in)directly review the decisions of the UNSC (although it made an exception for *jus cogens*). The ECJ states that 'an international agreement cannot affect the allocation of powers fixed by the [EU] Treaties or, consequently, the autonomy of the Community legal system'.[49] Relying on this argument of a separate legal order, the ECJ decided to present its claims as *internal*, although based on a dualist argument. However, this must be seen as a way to justify the deviation from the CFI. The ECJ had to come with a domestic quality to be able to really justify their reliance on the argument of an autonomous legal order. This quality was the protection of human rights. Referring to internal (EU) provisions the ECJ states that '[t]hose provisions cannot . . . be understood to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms'.[50] This is clearly an external argument: apparently, some values are too important to be derogated from.

Although the *Kadi* decision will not be applauded by the orthodox positivist, it unmistakably had an important function. By implicitly criticizing the sanctions regime of the UNSC, it created a feedback loop that – in combination with the fierce criticism

46 *Ahmed and Others*, *supra* note 28, at 45.
47 Benvenisti and Downs, *supra* note 27, at 18.
48 *Kadi*, *supra* note 29, at 279–91; see also regarding this aspect of the judgment D. Halberstam and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', (2009) 46 CMLR 13.
49 *Kadi*, *supra* note 29, at 282.
50 Ibid., at 303.

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of scholars – resulted in some changes in the sanctions regime.[51] As Daniel Halberstam notes, the ECJ came to its conclusion by taking a local constitutionalist (dualist) stance – although not entirely dualist, since it acknowledged that international law *might* set aside EU law.[52] So, in this specific situation, the ECJ circumvented the hierarchical consequences of Article 103 UN Charter and Article 27 VCLT by retreating to its own system. Human rights are presented as *fundamental* to the European legal order, and therefore the directives that implemented the UNSC resolutions and infringed those rights are quashed. Krisch is right that there is an accommodating element in the judgment (the directive is only quashed for *Kadi* and *Al-Barakaat*); however, the way he tries to affix *Kadi* to his version of pluralism is somewhat far-fetched:

> The ECJ's judgment . . . fits into an overall pluralist structure, one that is characterized by the coexistence of different legal orders, all with their own foundational norms and substantive commitments. For it is typical for pluralism that relations with other orders are assessed and governed by each order itself – *how* they are governed may then vary widely.[53]

The content of this statement is without a doubt valid, but it is curious that Krisch uses it to illustrate his version of pluralism, which explicitly excludes containment. If you read this quote carefully, Krisch implicitly says that one of the reactions to postnational law can be containment. If relations with other orders are assessed and governed by each order itself, this does not exclude an attitude of containment. Therefore, containment – taking a local constitutionalist stance – must be part of Krisch's pluralism, notwithstanding the clear dismissal he reserves for containment in the first part of his book. It must be clear, therefore, that containment is either a consequence or a part of the pluralism that Krisch proposes. And, as he notes himself in his opening chapters, this can have disturbing results.

4.3. Other case law

In the above decisions that are presented by Krisch as pluralist, we also see very strong containing tendencies. Both courts – explicitly – choose a certain quality, or value, that is central to their legal system and use this unquestioned value to take an external approach in this particular contentious case. The specific nature of these cases has put the judiciary under pressure to either choose to compromise fundamental domestic values or to circumvent international obligations. While the courts would normally have chosen the internal approach, they felt urged to take another position in this specific matter that infringed on important domestic values. And rightly so, many scholars will say (and have said): the counterterrorism regime of the Security Council has many flaws and, partly because of these judgments, some of them have been solved. However, if we look at the history of

51 See, e.g., T. Biersteker et al., *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'*, (2009); D. Cortright et al., 'Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures', issued by the Sanctions and Security Research Program (2009); look also at the improvements made by the UN Security Council, such as the instalment of an ombudsperson and a focal point.

52 Halberstam, *supra* note 1, at 184–90.

53 Krisch, *supra* note 4, at 172 (emphasis in original).

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national courts deciding on international law, we see many containing strategies of national courts that were also based on values central to their legal order, but whose outcomes are – for the general international lawyer – of a less appealing nature.

The argument to be made here is that, although the examples of *Kadi* and *Ahmed and Others* have led to defendable outcomes that might even serve as a valuable feedback loop to the international level, these decisions enhance the legitimacy of decisions less friendly to international law based on quality arguments as well. Take, for instance, the following statement of Lord Phillips in the *Horncastle* case, which dealt with an ECtHR decision on the use of hearsay evidence:

> The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.[54]

This case is fundamentally different from *Ahmed and Others* in that the international rule now urges the United Kingdom to abide by human rights, and not to breach them. Yet, this case is also partly assessed on the basis of the fundamental principle of parliamentary sovereignty and questions whether the ECtHR urges the court to breach this principle (the ultimate answer is 'no').[55] The Supreme Court solves this problem in two ways: first, by showing the value and the historical roots of the rule and, second, by assessing the Strasbourg case law and deciding that the English hearsay rule *does* meet the European standards. In a sense, it is a perfect example of legal pluralism, since it really does constitute a dialogue between the European and the British legal orders, but it is also an example of containment, for, in the end, the national procedural rule is given precedence over the human rights rule on the basis of the qualities of the national system (parliamentary approval and the 'fit' of this rule in the common-law system).

The well-known *Medellin* case of the US Supreme Court goes one step further. In this case, the Supreme Court did not regard the *Avena* decision of the ICJ (International Court of Justice) as binding at the national level. Again, a national procedural rule – the procedural default rule – plays a pre-eminent role. According to the Supreme Court, 'an agreement to abide by the result of an international adjudication can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution'.[56] This reminisces the *Solange* approach of the German Bundesverfassungsgericht, although it is of a more rigid and hierarchical nature. The US Supreme Court shields itself behind a strictly dualist position, which is more firm

54 *R v. Horncastle and Others*, [2009] UKSC 14, at 11.
55 Ibid., at 14.
56 *Medellin v. Texas*, *supra* note 38, at 24.

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than the UK Supreme Court's position in the *Horncastle* case. It also uses arguments based on democratic legitimacy, but what is most clear from the case is that the ICJ decision is disregarded because it is not in the national interest. When Krisch says that 'it is typical for pluralism that relations with other orders are assessed and governed by each order itself',[57] this could also be one of the outcomes.

A final step could be the reassessment of international obligations on the basis of religious norms, since these constitute central values for many countries. Many Islamic countries have already made reservations to human rights treaties that almost render these useless. If it becomes acceptable to review internationally binding rules on the basis of inherent qualities of the local legal system, Islamic countries can legitimately use Islamic law to set aside human rights norms, even if they have signed for these norms. This is obviously the most far-fetched consequence of legal pluralism, but one that cannot be easily rebutted if we really agree on abandoning constitutionalism altogether.

4. Conclusion

The outright embracement of pluralism that Krisch proposes could open a Pandora's box that is not easily closed. The largest problem is that Krisch's legal pluralism chooses principally an unsettled nature of authority, which entails the end of constitutionalism. At this moment in time, in which it becomes increasingly difficult to find support for international co-operation, striving for a more loosely founded international level seems unwise. This would lead to more legal uncertainty, which can cause more containment – exactly what is loathed by Krisch.

Another matter is what should happen with the hierarchical model as it exists today. Hierarchical problems at both the national and the international levels are often solved by a combination of the relevant articles of the national constitution, Article 27 of the Vienna Convention on the Law of Treaties, Article 103 of the UN Charter, customary law (including the concept of *jus cogens*), and the material content of the norms themselves. This might not be a perfect system, but it does mostly function well and serves as a framework that provides legal certainty to states, individuals, and other subjects of international law. Should legal pluralism fully replace the present hierarchical system? In that case, Krisch pays too little attention to the important role that the presently existing hierarchical framework plays even in the contentious 'pluralist' cases, like the *Kadi* case and the UK case law, in which judges are very aware of the hierarchical plight, but choose to deviate from it.

The *Kadi* and *Ahmed and Others* cases demonstrate that national courts taking an external perspective can create a valuable feedback loop to the international level. At the same time, it is clear that both these decisions have strong dualist-containing tendencies. If we want to accept these decisions, we must realize that this could open

57 Krisch, *supra* note 4, at 172.

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up the possibility of reviewing on the basis of less 'cosmopolitan' values. We might want to take this inherent effect for granted, since it seems important to curtail the negative effects of unlimited executive power and internationalization, but we must not be naive about the possible results. To mitigate these negative consequences, it is of great importance that constitutionalism remains an important aim at both the national and the international levels.

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