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The Structure of Constitutional Pluralism

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The structure of constitutional pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Post-National Law

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Nico Krisch's new book, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (BC), is a major contribution to the field of legal pluralism as applied to international legal regimes.¹ In clear and accessible prose, BC develops a nuanced account of the structural features of global law from a wide range of carefully considered normative positions and empirical claims, and provides detailed case studies of pluralism in action. For readers of I·CON, I would regard it as essential reading.

Given space limitations, my focus will be on the main disagreements I have with BC. Krisch stakes out complex positions, often through an “on the one hand [x], but on the other [y]” style of analysis that anticipates objections. My criticisms do not always capture the subtleties of the arguments and, for the sake of debate, are sometimes more sharply drawn than warranted. I will make three points. First, Krisch's conclusions are heavily dependent upon a theoretical construction—a supposed dichotomy between “constitutional” and “pluralist”—that is, in fact, a false one. Second, “constitutional pluralism” is a structural feature of the national legal orders to which BC pays the most attention (European), belying the dichotomy. Third, the case studies in BC provide empirical support for an alternative view: at least in some domains, a rights-based constitutional order is being constructed on pluralist foundations.

1. A false dichotomy

Driving much of the analysis of BC is a supposed distinction between two types—the *constitutional* and the *pluralist*—which Krisch characterizes as “competing models” (p. 226) and “true alternative[s]” (p. 71). BC sustains discussion of only one mode of

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¹ The field is growing rapidly. For a broad-based assessment of BC, see Gregory Shaffer, *A Transnational Take on Krisch's Pluralist Postnational Law*, 23 EUR. J. INT'L L. 565 (2012).

constitutionalism, embodied in what he labels the “foundational” and “comprehensive” constitution. In its liberal-democratic guise, the constitution constitutes state and polity, and provides the normative underpinnings for constructing and challenging the polity’s legitimacy over time. The foundational constitution is assumed to be complete: it establishes a single “overarching legal framework” (p. 23) and “comprehensively determin[es] the structure, processes, and values” of the system (p. 53). In contrast to pluralism, constitutionalism entails “clear cut hierarchies” (p. 103), stable *Grundnormen*, settled “rules of recognition” (pp. 11, 72, 74), and “ultimate conflict norms” and “rules” (pp. 293, 296) whose purpose is to enable a designated authority to resolve conflicts among norms and institutions effectively. Pluralism is explicitly conceptualized in opposition to constitutionalism. Whereas constitutionalism is related to “depoliticization,” and the desire “to tame politics” through legal rules (p. 69), pluralism is about “politics” and “political deliberation” but not the “rule of law” or “rule-based processes,” (pp. 23, 69, 277).

What is crucial is how Krisch applies these distinctions to the relationship between treaty-based systems and national legal orders, the central topic of the book. Krisch sums up his position as follows:

Constitutionalism and pluralism are distinguished . . . by the different extent to which [each] formally link[s] the various spheres of law and politics. While pluralism regards them as separate in their foundations, *global constitutionalism, properly understood, is a monist conception that integrates those spheres into one.* As a result, rules about the relationship of national, regional, and global norms are immediately applicable in all spheres, and neither political nor judicial actors can justify non-compliance on legal grounds (p. 242; emphasis added).²

Thus, global constitutionalism can only find its expression in a strong form of hegemonic monism.³ The resulting model is indistinguishable from federalism. “A constitutionalist setting needs to define hierarchies between the polities,” Krisch claims, in order “to integrate them into a common whole,” a task that must include the promulgation of clear rules delineating the respective competences of all levels of governance, as well as fixing the “rules for the amendment of the overall constitution” (p. 275).

I reject Krisch’s constitutionalism–pluralism dichotomy on both theoretical and empirical grounds. To get to the notion of “constitutional pluralism” one must specify what is simultaneously constitutional and pluralistic about the structure of a legal system.⁴ When considering the interface between international regimes

² “In a nutshell, postnational constitutionalism attempts to provide continuity with the domestic constitutionalist tradition by constructing an overarching legal framework that determines the relationships of the different levels of law and the distribution of powers among institutions” (p. 23).

³ De Búrca distinguishes between two forms of constitutionalist theory in this field: the “strong” position, of which Krisch is a representative, and a “soft” approach, which would include the constitutional pluralist position. See Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT’L L.J. 32 (2010). See also literature cited *infra*, notes 4 and 5.

⁴ See Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in *RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 258 (Jeffrey L. Dunhoff and Joel P. Trachtman eds., 2009); Daniel Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 150; Miguel Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in *RULING THE WORLD* 356; Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 633 (2009).

and national legal orders, scholars typically identify, as the basic scaffolding of a constitution, *jus cogens* norms, other substantive fundamental rights, standards of procedural due process, and access to justice.⁵ These norms find expression in multi-lateral and regional treaties, are firmly supported by *opinio juris*, and overlap fundamental rights inscribed in the vast majority of national constitutions.⁶ What makes the system “constitutional” is an overarching normative structure:⁷ the code of rights that judges and other officials are under a legal duty to enforce; and a set of shared techniques that national and international judges have developed to adjudicate rights, in dialogues with one another. At the same time, the distribution of authority within this presupposed constitution is pluralistic: the system is comprised of discrete hierarchies, national and treaty-based, each of which has an autonomous claim to legitimacy. Sovereignty—the authority to enforce fundamental rights—is “decentralized,”⁸ not least, in that no “ultimate conflict rule” or “final authority” to resolve conflicts exists.

Before turning to empirics, let me clarify the nature of the disagreement. First, to my knowledge, no one in the field would contest the basic elements of Krisch’s concept of pluralism: by definition, under conditions of pluralism, there is no “single decision-maker” applying “overarching conflict rules,” who will have the final word on many important legal questions (p. 296). Understanding legal pluralism, we would presumably agree, requires the analyst to take into account multiple vantage points at once, including the respective internal legal perspectives of actors operating in autonomous legal orders. Second, Krisch argues from a position that makes “constitutional pluralism” an oxymoron, a theoretical impossibility, whereas others in this same field have staked out a rights-based version of constitutionalism that accommodates pluralism.⁹ For Krisch, normative authority flows exclusively from hierarchy, rather than being grounded (my view) in the intrinsic legitimacy, binding nature, and integrating properties of fundamental rights themselves. Third, I reject Krisch’s law–politics distinction. Rights politics under conditions of pluralism are today heavily structured by law, legal discourse, and other rule-like norms and procedures, and they have steadily built new legal practices that serve to manage pluralism. As the empirics in BC show, rights politics and constitutional pluralism have been co-constitutive of one another. We have not moved “beyond constitutionalism,” rather, the age of global constitutionalism has barely begun.

⁵ Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1(1) J. GLOBAL CONSTITUTIONALISM 53, 62 (2012); MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, AND COMMUNITY 243–80 (2010); Ernst-Ulrich Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5 (Christian Joerges and Ernst-Ulrich Petersmann eds., 2006).

⁶ I collected data on national constitutions adopted since 1787. Of 114 national constitutions that have entered into force since 1985, we have reliable information on 106. Of these, all 106 contained a charter of rights, and all but five established a judicial mode of rights protection (North Korea, Vietnam, Saudi Arabia, Laos, and Iraq [in its 1990 constitution, now abrogated]). The last constitution to leave out a charter of rights was the racist 1983 constitution of South Africa. Alec Stone Sweet, *Constitutions, Rights, and Judicial Power*, in COMPARATIVE POLITICS 162 (Daniele Caramani ed., 2011).

⁷ Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749 (2008).

⁸ For a discussion of “decentralized sovereignty” with respect to rights protection, see *Supra*, note 5.

⁹ Krisch barely engages the literature (see *supra*, notes 4 and 5) on constitutional pluralism (BC, pp. 73–76).

2. The constitutional pluralism of European rights protection

The false dichotomy is fully exposed when we examine the formal “architecture” of rights-based constitutionalism in Europe (ch. 4).¹⁰ For Krisch, “constitutionalism” implies a focal point of “ultimate authority” (p. 103), whereas “pluralism” accepts “conflicting claims to ultimate authority” (p. 70). When it comes to rights protection, however, many domestic constitutional orders in Europe are pluralistic. Either we have to accept that these national systems are no longer, or never were, truly constitutional, or the theoretical framework of BC must be rejected.

As has been extensively documented,¹¹ not only have conflicting authority claims between national high courts not been resolved, they have generated the kind of inter-judicial, and jurisgenerative, politics that Krisch associates with pluralist orders. To illustrate, Krisch (pp. 14–17) argues that three basic strategies are available to a jurisdiction (X) when it is threatened by the lawmaking and supremacy claims of an external jurisdiction (Y), when Y seeks a change in how X takes decisions and makes law. First, X can pursue “containment,” by working to “limit the impact” of Y, in order to maximize its own autonomy and minimize disruption to standard ways of doing things. Second, X can seek to “transfer” the underlying logics of its ways to Y, thus lowering the costs of adjustment. Third, X can “break” with its established repertoire and, in effect, embrace or leverage pluralism as a means of increasing its own relevance, flexibility, and capacity to constrain Y in the future. Krisch developed the framework to analyze pluralist politics but, in fact, it neatly applies to rights politics within national orders that possess multiple, functionally differentiated high courts (the majority in Europe).

Consider bids on the part of constitutional courts to “constitutionalize” adjudication in the ordinary (non-constitutional) courts, through promoting the direct effect of rights. It is important to stress that this process, which is ongoing, is analogous to the Court of Justice of the European Union’s (CJEU) move to “constitutionalize” the EU through its doctrines of supremacy and direct effect. In Western Europe, constitutionalization has gone furthest in Germany and Spain, in the form of delicate accommodations forged by inter-court conflict and dialogue. Nonetheless, the supreme courts continue to marshal significant “containment” operations,¹² and their “transfer” efforts often succeed. In Italy, the Italian Court’s bid for supremacy failed: a “war of judges” ended in a settlement that, in effect, codified pluralism. Under the so-called “doctrine of the living law,” the Supreme Court (*Cassazione*) has *de facto* the “last word” on statutory interpretation and application, accepting only the “persuasive authority” of the ICC’s jurisprudence.¹³ In France, the Constitutional Council has no

¹⁰ BC is both Euro-centric and court-centric, which some might see as a limitation; see Shaffer, *supra*, note 1. I have chosen to assess the book on Krisch’s chosen terms.

¹¹ Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT’L J. CONST. L. 44 (2007); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 20–25 (2005); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 121–122 (2000).

¹² For Spain, see Leslie Turano, *Spain: Quis Custodiet Ipsos Custodes?: The Struggle for Jurisdiction between the Tribunal Constitucional and the Tribunal Supremo*, 4 INT’L J. CONST. L. 151 (2006). For Germany, see Gerhard Robbers, *Für ein neues Verhältnis zwischen BVerfG und Fachgerichtsbarkeit*, NEUE JURISTISCHE WOCHENSCHRIFT 938 (1998).

¹³ Garlicki, *supra* note 11, 55–56; Stone Sweet, *supra* note 11, 121–122.

formal means of imposing its rights interpretations on the Supreme Court (*Cassation*) or Supreme Administrative Court.¹⁴ Each of the three high courts is autonomous in its domain, and both supreme courts have positioned themselves to enforce EU rights and the European Convention of Human Rights (ECHR), even against statute. The outcome comprises a hugely important “break” with traditional separation of powers doctrine (the prohibition of judicial review of statute), while constituting a pluralist order within the French legal system.

In Central and Eastern Europe, too, many national supreme courts have refused to accept the binding interpretive authority and supremacy claims of the constitutional courts.¹⁵ The Polish courts have negotiated their own version of the Italian “living law” solution; and in the Czech Republic, the Supreme Court provoked a “war of judges” when it “openly revolted” against the Constitutional Court. In his empirical study of this topic, Garlicki (a former judge of the Polish Constitutional Court and the ECHR Court) concludes: “constitutional courts appear as weaker participants . . . and, in case of conflict, they are not always able to deliver that last word.” Indeed, for constitutional judges, a strategy of “dialogue and persuasion” has been more effective than have efforts to prevail in an “open conflict” about ultimate authority.¹⁶

The development of European rights has further consolidated rights pluralism within national orders. Today, one finds multiple sources of rights that are judicially enforceable against all conflicting infra-constitutional legal norms, including statute; there are multiple high courts that enforce these rights; and often there is no agreed upon conflict rule or procedure to settle conflicts of norms and authority. In most national legal systems, three such sources of rights—the national constitution, the EU treaties, and the ECHR—overlap. Individuals have a choice of which source to plead, and judges have a choice of which right to enforce. Ordinary judges may seek to limit the impact of the jurisprudence of the European courts; but they may also prefer to apply it, rather than domestic constitutional case law, in order to enhance their own authority and subvert that of constitutional courts. The German labor courts, for example, have partnered with the (CJEU) to raise German standards of rights protection in employment law, regaining the authority they had lost to German Federal Constitutional Court (GFCC), which has been steadily marginalized. Indeed, the German labor courts have invested heavily in the development of EU rights, as a means of cajoling the GFCC to change its (less-progressive) positions.¹⁷

Authority conflicts between high courts *within* domestic systems have long been a primary source of pluralist interactions between the CJEU and national constitutional courts (a fact Krisch largely ignores in chapter 4). To take a recent, dramatic example,

¹⁴ In 2008, the French Constitution was revised to permit the Supreme Court and the Council of State to refer laws to the Constitutional Council for review, in the context of ongoing litigation. The Constitutional Council, however, can neither force the other high courts to send a reference, nor control how the latter interpret and apply European law.

¹⁵ Garlicki, *supra* note 11; Sadurski, *supra* note 11, 20–25.

¹⁶ Garlicki, *supra* note 11, 68. In the footnote to this passage, Garlicki rightly notes that the analysis applies as well to the CJEU and the ECtHR in its relations to national constitutional courts.

¹⁷ Alec Stone Sweet & Kathleen Stranz, *Rights Adjudication and Constitutional Pluralism in Germany and Europe*, 19 J. EUR. PUB. POL'Y 92 (2011).

in 2010, the Czech Constitutional Court declared a part of the CJEU's ruling in *Landtová* to be *ultra vires* under Czech constitutional law, a first in the EU. The ruling was an attempt to discipline the Supreme Administrative Court, which had sent the *Landtová* reference to the CJEU in the first place. In response, the Supreme Administrative Court denied that it was bound by the Constitutional Court's decision, and referred the matter to the CJEU, clearly indicating that it disagreed with the Constitutional Court on both the merits and the authority claim (the case is still pending before the CJEU). This is domestic constitutional pluralism in action, as structured by the *legal* enmeshment of European and national systems of rights protection. Krisch analyzes such authority conflicts as if they were primarily between a European court and a national constitutional court, thus missing an essential part of the story.

With respect to the ECHR, all 47 full members of the Council of Europe have now incorporated the Convention (through constitutional provision, legislative act, or judicial decision) in a form that provides for the judicial review of state acts, including statute, under the ECHR.¹⁸ In all but two states (Ireland and the UK), judges must refuse to enforce statutes judged to be incompatible with the ECHR.

The domestication of the ECHR has diffused judicial review powers with respect to rights claims to all national judges, and institutionalized constitutional pluralism at the domestic level. In Belgium, the Constitutional Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, which led the Supreme Court to hold that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy *vis-à-vis* the Constitutional Court. Both courts are “supreme” in their respective domains, but neither can impose its will on the other. Would Krisch label such a situation “constitutional” or “pluralist”? In 2007, the Italian Constitutional Court (ICC) abandoned a strong dualist posture, holding that Italian judges are required to interpret national law in light of the ECHR and, where a conflict is unavoidable, to refer the matter to the ICC.¹⁹ Some ordinary judges simply ignore this obligation, while asserting their own authority to refuse to apply a controlling statute on grounds of incompatibility with the Convention.²⁰ In the absence of a reference, which is left to the discretion of the presiding judge, the ICC has virtually no means of enforcing its own case law. In France, the Netherlands, and Switzerland, the *de facto* bill of rights is the ECHR, not the national constitution, and in Scandinavia and much of post-communist Central, Eastern and Southern Europe, new bills of rights were modeled directly on the Convention. One could multiply examples, but the point should be clear: national rights protection in Europe today is both constitutional and pluralistic. The qualities that Krisch attributes to the foundational, comprehensive constitution—

¹⁸ Stone Sweet, *supra* note 8, Appendix, at 84–85.

¹⁹ The evolution of the ICC's position is traced in Mercedes Candela Soriano, *The Reception Process in Spain and Italy*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 405 (Helen Keller and Alec Stone Sweet eds., 2008).

²⁰ Mads Andenæs & Eirik Bjørge, *National Implementation of ECHR Rights*, in *CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT* (Andreas Follesdal, Birgit Peters, & Geir Ulfstein eds., forthcoming May 2013). Sabino Cassese, a judge on the Italian Constitutional Court, asserts regularly that Italy now has three judicially enforceable, rights-based “constitutions.”

clear hierarchies, conflict rules, final authority—are either non-existent or too weak to carry the burden of his argument.

In chapter 4, Krisch defeats a pallid strawman, a creature whose existence depends entirely on the constitutionalism–pluralism dichotomy. If the regime were a constitutional one, he claims, we would expect to find a “unified, well-ordered European human rights law with the ECHR at its top” (p. 126); instead one finds pluralism. In line with his basic framework, Krisch interprets any resistance by national constitutional courts to supposed “supremacy” claims of the CJEU or the Strasbourg Court as data counting against the “constitutional narrative” (pp. 109–112). In fact, such data counts in favor of the constitutional pluralist view. No constitutionalist pluralist (including Daniel Halberstam, Mattias Kumm, Miguel Maduro, Michel Rosenfeld, Neil Walker, myself) would expect a constitutional court to commit suicide, by formally subjugating the national constitutional order to the Convention. They would, instead, expect constitutional judges to assert their own supremacy within their own domain, and then to engage in the politics of pluralism, including initiating dialogues, both cooperative and conflictual, with the European courts and their own national supreme courts. This is, in fact, what has happened.

While Krisch emphasizes containment strategies, he all but ignores the dynamics of “transfer” and “break,” even when incorporation has been facilitated by the same ruling analyzed. Thus, he reads the GFCC’s *Görgülü* decision (2005) only in terms of containment. BC is silent on the fact that, in this same decision, the German Court made a clear “break” with long-standing dualist orthodoxies. *Görgülü* establishes a strong presumption that all German judges are to apply the Court’s jurisprudence when it is on point, except in “exceptional” circumstances, including when “it is the only way to avoid a violation of the fundamental principles contained in the Constitution.”²¹ The GFCC’s ruling also expanded the constitutional complaint procedure. Individuals can now challenge—as a violation of German basic rights—judicial rulings that ignore or fail to properly take into account the European Court’s case law, an influential approach pioneered by the Spanish Constitutional Tribunal. Rulings post-*Görgülü* have further enhanced the status of the Convention at bar.²²

The facts support a general proposition about European rights politics that appears to be irreconcilable with BC. Given formal incorporation, any increase in the effectiveness (the authority) of the Strasbourg Court’s case law within national orders will reinforce (a) the constitutional aspects of the overall regime, and (b) the pluralism of domestic systems of rights protection. This is, in fact, what is happening in most states.

3. Constitutionalism and global law

BC presents three detailed case studies of post-national pluralism that, in my view, provide strong empirical support for the view of constitutional pluralists. The latter argue that a pluralist constitution can be built through interactions between other-

²¹ Frank Hoffmeister, Germany: Status of European Convention on Human Rights in Domestic Law, 4 INT’L J. CONST. L. 728 (2006).

²² Stone Sweet, *supra* note 8, 70–71.

wise autonomous legal orders. The claim boils down to the following: the more intensive are the rights-based interactions between different legal orders, the more likely it will be that a constitutional jurisprudence of pluralism will gradually emerge and give a discursive, legal structure to these interactions. Whereas Krisch emphasizes the pluralism of European rights protection in chapter 4, it is also clear that his discussion is also about “things constitutional,” in a profound sense. Further, just as Krisch does (pp. 170–172, 289–291), constitutional pluralists stress certain mechanisms of systemic construction, such as *Solange* type judicial rulings and other forms of dialogic engagement. What about the case studies presented in chapters 5 and 6?

Chapter 5 of BC focuses on the targeted sanctions regime that the UN Security Council developed after the 2001 attacks on the World Trade Center in New York. Krisch rightly highlights the “administrative character” of sanctions: specific individuals are publicly named and targeted for mandatory punitive measures (including travel bans and asset freezes) that states, having only a “subordinate, non-discretionary” role, are required to implement (pp. 156–157). Whereas the Security Council had all but ignored human rights issues, other UN organs, especially the various human rights committees, as well as a host of national courts attacked the regime for failing to provide affected individuals with due process, including the means of challenging their appearance on the lists and access to an independent judicial authority. The chapter concludes with an analysis of the CJEU’s famous *Kadi* (2008) ruling, which subjected EU implementing regulations to review under EU fundamental rights, and found the regime deficient. In response, the Security Council adopted Resolution 1904/2009 creating an Ombudsperson to process and to make formal recommendations on individual petitions for delisting.

The empirics of this case provide strong support for the constitutional pluralist position, which stresses the overarching, overlapping structure of rights, and mechanisms for converting rights-based conflict into rights-based, constitutional dialogues.²³ Under this view, the “administrative character” of the UN sanctions regime took on “constitutional” features when targeted individuals began to challenge it on rights grounds before UN organs and courts. National courts and the CJEU invoked fundamental rights found in both national, regional, and international law, and a *Solange* style dynamic began to appear. In Krisch’s account, judges are the central managers of the emergent pluralist system, which he describes in terms of the “enmeshment,” “layering,” and “entanglement” of international and national levels of governance (pp. 160, 163). Yet, as BC emphasizes, the extent of pluralist “enmeshment” proved to be conditional on the resolution of rights and other constitutional issues. Indeed, the Ombudsperson himself would later state that “the decision of the CJEU, coming at the culmination of ongoing criticism—academic, political, and otherwise—as to the lack of a fair and transparent process, led directly to the . . . establishment of the Office of the Ombudsperson.”²⁴

²³ It is important to note that, in *Kadi I*, the CJEU did not embrace even the relatively weak constitutional-pluralist position proposed by Advocate General Maduro. Instead, it stressed the autonomy of the EU’s legal system, arguably, to reinforce its own authority with respect to national high courts; see Halberstam, *supra* note 4. See also De Búrca, *supra* note 3, 40–48.

²⁴ Lecture of the Ombudsperson, National Autonomous University of Mexico, June 24, 2011, available at <http://www.un.org/en/sc/ombudsperson/pdfs/Mexico%20Presentation%20-%2024%20June%202011%20%28English%29.pdf>.

Since *BC* was published, pressures for reform of the regime continued to mount, as Krisch had predicted (pp. 159–160). In *Kadi II* (2010), the General Court of the EU (GCEU) actually employed a *Solange* formulation: it would engage in “full review” of the implementation, within the EU, of the sanctions regime, “at the very least” and “so long as” the de-listing “procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection.” The GCEU annulled the regulation at issue while rejecting, as insufficient, the reforms provoked by *Kadi I*. The regime established by SC 1904/2009, the General Court declared, neither provided for “effective judicial procedure for review of decisions of the Sanctions Committee,” nor for a “mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively.” The GCEU also criticized the fact that de-listing an individual would “require consensus within the Committee,” that is, any member could veto an Ombudsperson’s recommendation to remove an individual from the list.²⁵

In light of *Kadi II*, and under growing pressure from UN committees and other organs, the Security Council again responded. Resolution 1989/2011 renewed the office of the Ombudsperson, codified extensive procedures, information exchange, and “dialogue” with listed individuals, and bolstered the influence of the Ombudsperson’s recommendation to delist. A delisting recommendation will now prevail unless there is consensus *not* to adopt it, in which case states further procedures are required if the listing is to be maintained.²⁶ Less than two weeks after the adoption of Resolution 1989/2011, the UN Special Rapporteur on Human Rights and Counter Terrorism, Martin Scheinin, weighed in. While acknowledging that the Security Council “has proven responsive to criticisms” and had strengthened due process, Scheinin nonetheless concluded that the new 1989/2011 system still does not “meet international human rights standards concerning due process or fair trial,” leading him to endorse a *Solange* strategy on the part of courts “as long as proper due process is not guaranteed at the United Nations level when listing individuals or entities as terrorists, national (or European Union) courts will need to exercise judicial review over the national (or European) measures implementing the sanctions.” He ended by proposing more extensive reforms which, if adopted by the Security Council, would make it “likely that national or European courts [would] require petitioners to exhaust the delisting procedure of the Ombudsperson before exercising their jurisdiction in relation to the national or European implementing measures.”²⁷

To date, the Ombudsman has opened 33 cases, resulting in 19 decisions to delist the petitioner, one denial, and one withdrawn request (the rest are pending).²⁸ On October 5, 2012, the Security Council delisted Mr. Kadi, the plaintiff who had activated the European courts as well as several national courts.²⁹ This is slow

²⁵ Case T-85/09, *Kadi v. EU Commission* (Sept. 30, 2010), ¶¶ 126–128.

²⁶ SC Resolution 1989 (2011) June 17, 2011, ¶ 21 and Annex II.

²⁷ In another forum, Scheinin has argued that “the *Kadi* case is compatible with international human rights law, as expressed in United Nations human rights treaties,” and that “the outcome . . . has much support in institutional United Nations law.” Martin Scheinin, *Is the CJEU Ruling in Kadi Incompatible with International Law?*, 28 Y.B. EUR. L. 637 (2009).

²⁸ One can follow the Ombudsperson’s progress at: <http://www.un.org/en/sc/ombudsperson/status.shtml>.

²⁹ SC 10785, Oct. 5, 2012, available at <http://www.un.org/News/Press/docs/2012/sc10785.doc.htm>.

going, but the process now has a rights-based, interactive structure. The process is also meaningfully about “things constitutional.” The famous *Solange* saga, after all, showed how inter-jurisdictional conflict (between the GFCC and the CJEU) over contending supremacy claims could serve to construct rights-based constitutionalism in Europe, despite the fact that supremacy conflicts were never firmly resolved.

Krisch treats *Solange* style engagement as a paradigmatic mechanism for generating the “reciprocity expectations” and “interface norms” (pp. 186–194) that are necessary for the successful management of rights-based pluralism within Europe. Yet when human rights are not central to pluralism, the intensity of constitutional dialogue is greatly reduced. Chapter 6 examines how sharp differences in American and European approaches to risk regulation and genetically modified foods generated WTO litigation; in response, Krisch shows, European courts are now actively engaging with WTO law in this area, despite the fact that the CJEU had held that the WTO agreements do not possess direct effect within the EU order. Although such interactions may eventually take on constitutional features,³⁰ for now they seem geared to supplying functional coordination on narrower grounds. More generally, as Gregory Schaeffer stresses in his review of *BC*, most global regulation and standard setting in areas such as manufacturing, banking, taxation, bankruptcy, money laundering, air transport, and so on, is today generated through processes that connect the decision-making of transnational actors, organizations, and state officials.³¹ While much of transnational governance is pluralist in complexion, most of it is not constitutional in any meaningful sense.

4. Conclusion

BC is the most important book yet written on the development of legal pluralism at the intersection of certain (but not all) international regimes and national legal orders. Given the present forum, my focus has been on the constitutional aspects of the book. I have made three main points. First, the constitutionalism/pluralism dichotomy is a false one. Scholars now routinely conceptualize legal systems as both constitutional and pluralistic for purposes of empirical analysis. Second, when it comes to rights protection, most domestic constitutional orders in Europe are in fact pluralistic. As Krisch argues, legal pluralism and authority conflicts often go hand in hand, and we find both *within* national constitutional orders. Third, the notion of “constitutional pluralism” fits the data presented in *BC* better than does the framework fashioned from the constitutional/pluralism dichotomy. The book provides strong support for pluralist, rights-based constitutionalism when rights are, in fact, on the table, and when rights-protecting courts, especially European, are major actors. And, as one would expect, we find less evidence of constitutional pluralism when rights are not in play, and when rights-protecting courts are not the main actors.

³⁰ See Petersmann, *supra* note 5.

³¹ Shaffer, *supra* note 1, 577–579.