Navigating law's complexities: Concepts for postnational law—A reply to Nico Krisch

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In this Reply to the article by Nico Krisch, the idea of entangled legalities is questioned from a theoretical point of view. Pointing out entanglement empirically is not enough to give the concept body; it needs to be embedded in a theory of law. Elaborating Krisch's critique on seeing law as a system, I argue that entanglement implies a concept of law that is practice-based: a shift from norms to what actors do with law. A practice-based view of law focuses on interactions between actors, highlighting the social and value-laden character of law. This reconceptualizes systemic thinking as a tradition that has developed in legal practices and broadens the concept of law to include postnational phenomena as an integral part of what law is. Using an example from climate change litigation, I argue that this conceptualization tracks normative claims by legal actors that no longer make a sharp distinction between formal legal norms and other normative standards. Combining entanglement and law as practice thus helps to make sense of postnational legal practices.

1. Introduction

Thinking about law's plurality in new terms is a very welcome endeavor. By theorizing it in terms of entanglement and legalities, Nico Krisch rightly points to the limiting character of system-based theorizing, which indeed cannot, and probably does not wish to, escape a view of law as comprising separate systemic units.[1] The two dominant alternative ways of thinking, putting forward legal pluralism and interlegality, have drawbacks of their own. Although legal pluralism scholarship is still very much alive, Nico Krisch makes a good point in criticizing it for remaining wedded to an idea

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1 Nico Krisch, *Entangled Legalities in the Postnational Space*, 20 Int'l J. Const. L. 000 (2022).

of "unconnected" legal orders, identifiable "bodies of law."[2] Although this is primarily the case in legal scholarship, and less so in anthropology and sociology of law, the image of particular legal orders caught up in problems of relating to each other prevails. That image is dispelled in theories of interlegality, where the focus is on "legal spaces [that are] superimposed."[3] The main advance here is a more open attitude to norms traveling, and seeing the possibilities of combining norms of different kinds and provenance.[4] The drawback is that interlegality does not theorize the nature of these interlegal encounters, it merely acknowledges that they take place. There is theoretical room for a new way of engaging with plurality in law.

I understand Krisch's project as an attempt to move beyond the recognition of multiplicity towards theorizing the "interactions across different sites and layers of law."[5] To do this, he introduces the concept of legal entanglement. The issue I see as central is the point and reach of this concept: why is it important to see plural legal phenomena as "entangled," and what does entanglement imply for our understanding of the concept of law? In the following, I first characterize entangled legalities as a scholarly project (Section 2). With a primary focus on empirical understanding, the project runs the risk of dissolving in a variety of case studies. In order to contribute to legal scholarship theoretically, it needs to address conceptual and normative dimensions too. In Section 3, the focus is on the core category of "straddling practices" and what they imply for conceptualizing law, arguing that this needs to go beyond thinking in terms of legal systems. In Section 4, an account of a practice-based view of law is developed to complement Krisch's arguments about practices of entanglement. In Section 5, a brief, explorative argument is made for including a normative understanding of entangled legalities as part of legal practice.

The main purpose of this comment is to offer a conceptualization of law that is compatible with Krisch's idea of entanglement in postnational law, but that is thicker than a framework for grasping the variety of empirical phenomena.

2. "Entangled legalities" as an empirical and a conceptual project

Krisch borrows the concept of entanglement from other disciplines, most centrally history. He characterizes its use of entanglements as highlighting "the importance of

[2] *See, e.g.*, Paul Schiff Berman, *Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative*, *in* The Oxford Handbook of Global Legal Pluralism 1 (Paul Schiff Berman ed., 2021). Although most legal pluralism scholars acknowledge an unclear boundary between law and other normative systems or orders, these are generally all seen as connected sets of norms. *See* Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 Sydney L. Rev. 375 (2008).

[3] Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. L. & Soc'y 279, 297 (1987).

[4] *See, e.g.*, Samia Bano, *Multicultural Interlegality? Negotiating Family Law in the Context of Muslim Legal Pluralism in the UK*, *in* 12 Law and Anthropology: Current Legal Issues 408 (Michael Freeman & David Napier eds., 2009); Craig Proulx, *Blending Justice. Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System*, 37 J. Legal Pluralism 79 (2005).

[5] *Krisch, supra* note 1, at 000.

relations between interconnected societies."[6] He argues that, in relation to law, entanglement is not just a matter of observing how norms and institutions influence each other, but also of seeing how actors construct the interactions between norms. This underscores the point that legal systematicity or order is created. All of these points help us understand how law in fact operates: what norms are at play, how they are brought into discourse, how they are interpreted in light of each other. Especially in the contemporary example Krisch gives of corporate social responsibility, the range of norms involved and the ways in which actors use and link these is clearly present.

As an empirical matter, the entanglement thesis convinces: it helps to describe and map phenomena in today's legal world. Yet, although this is an important contribution to scholarship, this seems not to be the only ambition for the concept, or if it is, it should not be. In addition to capturing the changing empirical manifestations of law, entanglement also puts forward a theory about law. In the article, the idea of entanglement and the typology put forward take pride of place, but Krisch embeds these in remarks about the nature of law. "In this image, law is not one, but it is also not just many."[7] A crucial theoretical ambition therefore seems to be conceptual: to put forward a concept of "entangled legalities" that can help make sense of law as both singular and plural. However, the implications of this duality remain underexplored. Krisch foregrounds the importance of entanglement for empirical purposes: "[it] should enable us to gain a clearer picture of the structures of law that exist in social practice,"[8] and does not elaborate on implications for the concept of law.

The main contrast that Krisch draws is between entanglement of legalities and law as a system. The emphasis is on showing how law is neither one monist system, nor a plurality of multiple systems. The critique that joins these claims together is that systematicity, which lawyers tend to emphasize, is not the feature of law that best aligns with what occurs in the postnational context. The systematic relationship between norms, either within a system or between systems, is not sufficient to understand the interactions between norms of various origins. In the typology of forms of entanglement, Krisch includes a different term, "straddling practices," which can fruitfully be used as a starting point to develop a fitting conceptualization of law.

3. Norms and practices in the typology of forms of entanglement

Within the typology of forms of entanglement, two of the types—reception norms and overarching norms—are part of the familiar universe of legal systems, as Krisch indicates. The third category, straddling practices, is not; it seems to belong to a different world. Krisch situates them on the same line as reception norms and overarching norms, the line between separation and integration, claiming that the

[6] *Id.* at 000.
[7] *Id.* at 000.
[8] *Id.* at 000.

straddling practices lie in between. Not only is it a "wider and more inchoate field," the terminology which Krisch uses to explain this category is different. Rather than speaking in terms of norms that "reproduce," "define," and "create," straddling practices include "ad hoc" linkages and "situational moves." Although Krisch refers to all three categories as "entangling practices," the shift in emphasis is striking: in the first two, norms are the central, defining element; in the third, norms are part of the practices of actors.[9] To introduce a metaphor: reception norms and overarching norms appear as self-driving cars, whereas norms in straddling practices are used and steered by actors. Why this difference, and what are the consequences?

One reading is that Krisch simply adheres to terminologies that are established, making it easier to explain how each category functions. Because lawyers speak of systems of norms, especially when it comes to establishing relations between or within systems, it makes sense to do the same. This is not possible, however, for straddling practices, because most lawyers do not really consider such practices to be an integral part of legal systems and the norms involved in these practices are of different kinds, and therefore difficult to systematize. On this reading, Krisch simply tracks legal conventions.

A second reading sees the terminology as more meaningful, as pointing to different ways of conceptualizing law. One could argue that a system-based view of law is fundamentally different from a practice-based view, and that Krisch switches perspectives. This would be in line with Wibren van der Burg's idea of law as an essentially contested concept with two incommensurable models of "law as a product" and "law as a practice."[10] Here, the argument would be that lawyers cannot help switching between seeing law as a body of norms and seeing law as a dynamic practice. Although this is a plausible reading, it hinges on accepting the idea of incommensurable models. I suspect that this is not Krisch's epistemology, speaking as he does of law as one and many at the same time.

I would therefore propose a third reading, which sees norms and practices as combined in one idea of law. Law breaks apart in many different practices with variable sets of norms involved, but can still be understood as one kind of enterprise. Admittedly, this third reading goes beyond the argument that Krisch makes in the article. However, I would submit that it is in line with that argument and that it is a crucial step in theorizing postnational law. Moreover, I would argue that this is also the most fruitful way of conceptualizing law to have it include postnational law. In the following I construct a practice-based view of law that I believe to be both plausible and compatible with Krisch's account.

4. The centrality of practices for conceptualizing (postnational) law

In order to make sense of law as one kind, it is more fruitful to start from the side of practices than from the side of norms. Legal practices are performed by the actors

[9] *Id.* at 000.

[10] Wibren van der Burg, *Law as a Second-Order Essentially Contested Concept*, 8 Jurisprudence 230 (2017).

that do law, making norms work; they include creating, interpreting, and criticizing norms. Seeing law as practice-based makes it possible to include elements of law that are less easy to formulate as norms, such as customs. While starting from practices can easily include norms, and include them in a flexible and variable way, the reverse is not true. Starting from norms reduces practices to ways of doing things with norms, excluding the dimensions of practices that cannot always be understood as norm-based, such as interactions between actors. A good example of a theory that puts interactional practices first is Brunnée and Toope's theory of international law.[11] As they do, I would also take the work of Lon Fuller as central in underpinning such an account.[12]

In an account of law as interactional practice, it is not just the activities of discrete actors that form law but primarily the interactions between them. Interactions give rise to expectations, which in themselves have a normative dimension but which also build on accepted norms and shared values.[13] Thus, a practice-based account that centers on interaction can make sense of law's social character. It also makes it easier to see the openness of law towards other social practices and the norms and values that are part of those. Some practices may be more stable, being based in strong communities; others may be more fluid or temporary.[14] Thus, law as interactional practice aligns easily with Krisch's idea of straddling practices as "practices that tie together norms from different origins in various ways" and even more so as "the practices that shape the relations of different legalities [which] are often not guided by norms (or refer to them) but proceed through situational moves by legal actors."[15] Law as interactional practice emphasizes how actors jointly form, interpret, and construct both legal activities and legal norms and allows for multiple forms of influence from other practices.

Considering Krisch's example of corporate social responsibility (CSR), law as interactional practice not only fits the reality of courts using formal legal norms and informal standards and guidelines to construct CSR obligations, but can also make sense of the interactions between various actors, such as National Contact Points, multinational companies, and activists, and the multiplicity of norms they use.[16] Such a conception of law thus fits the empirical phenomena of transnational law that Krisch describes better than a system-based account.

[11] Jutta Brunnée & Stephen J. Toope, Legitimacy and Legality in International Law: An Interactional Account (2010). Van der Burg also proposes a theory of legal interactionism, based on Fuller, but works with the two models referred to earlier, so is not fully practice-based. Wibren van der Burg, The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism 19–32 (2014).

[12] Lon L. Fuller, *Human Interaction and the Law*, *in* The Principles of Social Order. Selected Essays of Lon L. Fuller 211 (Kenneth I. Winston ed., 1981); Sanne Taekema, *The Many Uses of Law: Interactional Law as a Bridge between Instrumentalism and Law's Values*, *in* In Pursuit of Pluralist Jurisprudence 116 (Nicole Roughan & Andrew Halpin eds., 2017).

[13] The account here is necessarily sketchy, but builds on Taekema, *supra* note 12, and Sanne Taekema, The Concept of Ideals in Legal Theory 171–96 (2003).

[14] Roger Cotterrell, Sociological Jurisprudence: Juristic Thought and Social Inquiry 112–14 (2018).

[15] Krisch, *supra* note 1, at 000.

[16] *Id.* at 000.

This does not mean that law as interactional practice solves all theoretical problems. Thinking in terms of legal systems clearly has an important place in how law is practiced currently. The choice to include more traditional systemic forms of entanglement in the typology is a good way to reflect this in the theory. However, it is too easy to leave it at that. The question should be answered how systemic thinking can be combined with a practice-based view in order to retain the idea of law as one concept.[17] I believe this can be done by acknowledging the traditions and practices that have developed as law.[18] Systemic thinking is itself a product of legal practices and the construction of legal systems helps actors to navigate the legal terrain more easily. Especially by paying attention to long-standing values of law, such as legal certainty or equality before the law, as part of these practices, it is clear that using systems helps to realize these. However, as Krisch points out, postnational law makes less use of systems and systemic thinking than more standard national or international law, which means that a broader, practice-based view of law is more fruitful as an account to include postnational law.

5. The normativity of postnational law

The previous section made the argument that law as interactional practice forms a good conceptual base for Krisch's view on postnational law, but it is still an open question whether this is enough to construct a fully convincing account of postnational law. The problem that remains, in my view, is to turn this into a normative legal argument. Part of the inspiration for both Krisch and a practice-based conception of law is anthropological: the wish to give a truthful account of what goes on in the variegated realm of postnational law. However, tracking empirical phenomena and building a theory to match these takes an external perspective on law, which leaves certain questions untouched. Most importantly, Krisch shows how judges, decision-makers, and litigants make use of entanglement and entangling to make normative legal arguments. The tough question is whether theorizing practices of entanglement also makes sense of their legal normativity, on their terms.

In the pluriform set of straddling practices that Krisch describes, it is striking how many of these make use of standards and rules that are not part of the formal sources of law. Although some of these straddling practices are performed by actors that cannot be seen as straightforwardly legal either, for example National Contact Points or sports tribunals, many of them are taken up by traditional legal actors as well. One of the legal openings for entanglement pointed out by Krisch is the existence of open concepts such as due diligence. I focus on one case, in which this has far-reaching normative consequences, to suggest that within legal practices quite a few actors, perhaps even a growing number, no longer care so much about the formal character of norms. The case is *Milieudefensie et al. v. Royal Dutch Shell*, which was

[17] *Cf.* Sanne Taekema, *Between or Beyond Legal Orders: Questioning the Concept of Legal Order*, *in* The Challenge of Inter-legality 69 (Jan Klabbers & Gianluigi Palombella eds., 2019).

[18] Martin Krygier, *Law as Tradition*, 5 Law & Phil. 237 (1986).

decided by a Dutch district court in May 2021.[19] Milieudefensie claimed that the duty of care of Shell under tort law included an obligation to reduce its carbon emissions, and the Court awarded the claim. Although it has been standard Dutch court practice since the early twentieth century to use the duty of care as an opening towards social norms of due care, in this judgment the Court drew on a very broad range of sources to construct the legal obligation of Shell, including internal policies of Shell, human rights, the UN Guiding Principles and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Responsible Business Conduct, the Paris Agreement, and Intergovernmental Panel on Climate Change (IPCC) reports. What is striking about the reasoning in the judgment is that the Court does not place emphasis on whether sources have legal status. All these standards and considerations together make up the justification for assuming a legal obligation. The result is that a multinational company is held responsible for direct and indirect carbon emissions and ordered by the Court to reduce them.

This example supports Krisch's idea that legal actors make use of entangling legalities. Although it is (at present) an extreme case, it also shows how legal actors strengthen the entanglement. One way to interpret this striking judgment is to see the claimants, the non-governmental organizations (NGOs) and activists, and the court as trying out a new, stronger connection between various normative standards and sources as the basis for legal argument. Climate change is not just the postnational problem par excellence, its urgency also gives legal actors the courage to strike new normative paths.

To conclude: the added value of entanglement for thinking about law in the postnational context is clear to me. As all new ideas, it merits discussion of its implications and a further deepening of its conceptual and theoretical base. I hope that it does not remain a concept for a select group of scholars of transnational law, but that it also becomes part of the toolkit of lawyers and a way to advance a broader outlook on and in the practice of law.

[19] Rechtbank Den Haag 26 mei 2021, ECLI:NL:RBDHA:2021:5337 (Neth.). *See* Ioannis Kampourakis, *The Power of Open Norms: Milieudefensie et al. v. Royal Dutch Shell*, Verfassungsblog (June 15, 2021), www.verfassungsblog.de/the-power-of-open-norms/.