WORKSHOP
THE OPENNESS OF EUROPEAN NATIONAL LEGAL ORDERS TO INTERNATIONAL LAW (AND EUROPEAN LAW): THEORY, METHOD, AND DEVELOPMENTS

Paris, 26 November 2021. Centre Universitaire de Norvège à Paris CNUP, Fondation Maison des Sciences de l'Homme, Boulevard Raspail 54, 75006 Paris
14.00 – 18.30

Organised under the auspices of the **University of Oslo – Faculty of Law, Department of Private Law and PluriCourts**, **Université Paris 1 Panthéon/Sorbonne – IREDIES (Institut de recherche en droit international et européen de la Sorbonne)**, **University of Strasbourg - Centre d'Études Internationales et Européennes (CEIE), Høgskolen i Innlandet (Lillehammer), and Centre Universitaire de Norvège à Paris**.

Organising Committee
Freya Baetens, Mads Andenas, Emanuel Castellarin, Johann Ruben Leiss and Paolo Palchetti.

Venue
The workshop will be held on-site in Paris, in CNUP, Fondation Maison des Sciences de l'Homme, 54 Bd Raspail, 75006 Paris.

Participation via Zoom will be possible. The Zoom link is included in the email.

The address of the restaurant for the dinner is also included in the email.

The workshop will be held in English.
Le séminaire se déroulera en anglais.

This workshop explores the 'openness' of European national legal orders to international law and European law.[1]

Even though the relationship between national law and international law, as well as national law and European law, is a perennial issue that has occupied legal scholars and practitioners since the birth of international law and European law, it has not lost its significance as a subject for further exploration. Rather, in recent decades the increasing relevance of international law and European law in the domestic context has kept this topic high on the agenda of international, European, and domestic legal practice and discourse. More recently, it has attracted growing attention in light of an alleged backlash against international law and European law. Concerns of democratic legitimacy, effectiveness, and of final authority in legal matters have been raised in national legal systems against international law and international adjudication, as well as European law and European adjudication. From political and judicial resistance against the ECtHR in the UK and Russia[2], over deficient application of EEA law in Norway in the context of the Norwegian Social Insurance Scandal,[3] to challenges against the application of EU law in Germany[4] and in Poland[5], numerous recent cases and developments underline the importance of further research in this field.

The traditional binary approach to the interrelationship between domestic law and international law, as well as domestic law and European law, relying on monism[6] and dualism[7], has increasingly been criticized as lacking in explanatory force. Few European domestic legal systems, if any, seem to fit neatly as either entirely monist or entirely dualist in their approach to international law and European law.[8] For example, the German Federal Constitutional Court (FCC) is marked by its openness towards international law and European law and constantly strives to avoid conflicts between international law and German law and between European law and German law,[9] despite paying lip service to a dualist reading of the German

[1] This workshop is part of a research project under the auspices of the *PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order* studying the relationship between national law and international law.

[2] See Judgment no 12-P/2016 'in the case concerning the resolution of the question of possibility to execute the Judgment of the ECtHR of 4 July 2013 in the case of Anchugov and Gladkov v Russia (Applications nos. 11157/04 and 15162/05) in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation'. Unofficial English translation available at www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf, last visited 11 October 2021.

[3] On the so-called 'NAV scandal', see H.-P. Graver, 'The Impossibility of Upholding the Rule of Law When You Don't Know the Rules of the Law', Verfassungsblog, 14 November 2019, available at https://verfassungsblog.de/the-impossibility-of-upholding-the-rule-of-law-when-you-dont-know-the-rules-of-the-law/, last visited 11 October 2021.

[4] Cf. the decisions of the Germen Federal Constitutional Court (FCC) on the ECB decisions on the Public Sector Purchase Programme, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[5] See the decision of the Polish "Constitutional Court" from 7 October 2021, available at https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej, last visited 11 October 2021.

[6] For a strong dualist view, see C. H. Triepel, Völkerrecht und Landesrecht (C. L. Hirschfeld 1899). For a more recent dualist perspective, see G. Arangio-Ruiz, 'Dualism Revisited, International Law and Interindividual Law' (2003) 86 Rivista di diritto internazionale 909, with further references in 909 [fn 1].

[7] For a strong plea in favour of monism, see H. Kelsen, *Introduction to the Problems of Legal Theory* (B. Litschewski Paulson and S. Paulson trs, Clarendon Press 1992), 111-125; H. Kelsen, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik* (Franz Deuticke 1934), 134-154; H. Kelsen, *Pure Theory of Law* (M. Knight tr, University of California Press 1967), 328-347.

[8] For the present purpose, legal pluralism (in the narrow sense referring to a plurality of co-existing national, supra and international legal orders) is considered a version of dualism.

[9] 'Openness' has become a Leitmotif of the German legal order and is reflected in the concept of 'open statehood' ('*Offene Staatlichkeit*'), which was initially coined by K. Vogel, Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: ein Diskussionsbeitrag zu einer Frage der Staatstheorie sowie des geltenden deutschen Staatsrechts (Mohr Siebeck 1964). Accordingly, the German Basic Law's (the German Constitution,

legal order.[10] Similarly, the Italian legal system is characterized by a general openness to international law and European, though being dualist in nature.[11] Similar approaches can be found in many other countries that follow a dualist paradigm, but which show a general openness and where conflicts and tensions between international law and domestic law and European law and domestic law are usually avoided by all necessary means. At the same time, few states seem to open up unconditionally and without limits. They apply so-called 'counter-limits', which may close the legal order under certain circumstances.[12] The 'as-long-as' ('*solange*'),[13] ultra-vires[14] and constitutional identity[15] jurisprudence of the FCC, and the Sentenza jurisprudence of the Italian Constitutional Court[16] are cases in point. Monist theories have difficulties explaining this conditional openness.

The different ways international law and European law and the different effects with which international law and European law find their way into domestic legal orders challenge a simple classification along the lines of the traditional dualism and monism dichotomy. As such, it is suggested that there is a need to look beyond the binary distinction between monism and dualism, in search for concepts and approaches capable of more accurately identifying and describing these relationships. Presuming that neither the fully secluded nor the unconditionally open domestic legal order does not exist, the discussion about the interrelationship of domestic law with international law and European law may be better approached by identifying the level and character of openness between domestic law and both legal

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Grundgesetz) is characterized by its 'openness', or 'friendliness' to international and European law, see eg Land Reform (Bodenreform) III case no 2 BvR 955/00, Order of the Second Senate of 26 October 2004, BVerfGE 112, 1, 25-26 [91]-[95]. Some argue that 'Friendliness' ('*Freundlichkeit*') seems to reflect better the 'distinctly sympathetic' approach of the Basic Law than the term 'openness', cf A. L. Paulus and J.-H. Hinselmann, 'International Integration and Its Counter-Limits: A German Constitutional Perspective' in C. Bradley (ed), Oxford Handbook on Foreign Relations Law (OUP 2019). This 'openness' finds it legal basis in Articles 23, 24, 25, 59(2) of the German Basic Law which constitute hinge provisions that determine the 'openness' of the German legal order towards international and European law.

[10] See eg FCC, case no 2 BvR 1481/04, Order of the Second Senate of 14 October 2004, BVerfGE 111, 307 [318].

[11] See eg *Sentenza no 238/2014* ECLI:IT:COST:2014:238, available at <www.cortecostituzionale.it>, accessed 30 September 2018, [Conclusions in Point of Law] [3.1.] (Sentenza (Italian Constitutional Court)). The Italian Constitutional Court bases the openness on Article 10 and 11 of the Italian Constitution. See further, the so-called 'twin judgments' (sentenze gemelle) 348/2007 and 349/2007.

[12] A. L. Paulus and J.-H. Hinselmann (n 9). It seems as if the term 'counter-limits' has been coined by P. Barile, 'Ancora su diritto comunitario e diritto interno' in G. Ambrosini (ed), Studi per il XX anniversario dell'Assemblea costituente, vol VI (Vallecchi 1969) cited in accordance with G. Martinico, 'Is the European Convention Going to be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 European Journal of International Law 401, 419 [fn 49].

[13] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)* case no BvL 52/71, Order of the Second Senate of 29 May 1974, BVerfGE 37, 271, [56]; *Re Wünsche Handelsgesellschaft (Solange II)* case no 2 BvR 197/83, Order of the Second Senate of 22 October 1986, BVerfGE 73, 339, [132]. See also the further development of this approach in: *Maastricht* case no 2 BvR 2134, 2159/92, Judgment of the Second Senate of 12 October 1993, BVerfGE 89, 155 (Maastricht (FCC)); Lisbon (Lissabon) case no 2 BvE 2/08, Judgment of the Second Senate of 30 June 2009, BVerfGE 123, 267 (Lisbon (FCC)) (n 208); *Emission Allowance (Treibhausgas-Emissionsberechtigungen)* case no 1 BvF 1/05, Order of the First Senate of 13 March 2007, BVerfGE 118, 79; *European Act on Warrants of Arrest* (Europäisches Haftbefehlsgesetz*)* case no 2 BvR 2236/04, Judgment of the Second Senate of 18 July 2005, BVerfGE 113, 273; *Honeywell* case no 2 BvR 2661/06, Order of the Second Senate of 6 July 2010, BVerfGE 126, 286 (Honeywell (FCC)); *Data Retention* (Vorratsdatenspeicherung) case no 1 BvR 256/08 and others, Judgment of the First Senate of 2 March 2010, BVerfGE 125, 260; *Constitutional Identity (Identitätskontrolle)* case no 2 BvR 2735/14, Order of the Second Senate of 15 December 2015, BVerfGE 140, 317.

[14] Maastricht (FCC) (n 13) 187-188; Lisbon (FCC) (n 13) [225]-[272]; Honeywell (FCC) (n 13) 126, [54]-[57]. OMT (Judgment) cases nos 2 BvR 2728/13 and others, Judgment of the Second Senate of 21 June 2016, BVerfGE 142, 123 headnote 1.

[15] Lisbon (FCC) (n 13); Constitutional Identity (Identitätskontrolle) case no 2 BvR 2735/14, Order of the Second Senate of 15 December 2015, BVerfGE 140, 317.

[16] Sentenza (Italian Constitutional Court) (n 11).

orders and role of 'counter-limits'. We may imagine a spectrum with the closed (dualism *in extremo*) and the open (monism *in extremo*) as the outer edges, and that the inter-relationship between a particular domestic order and international law and European law (constantly) move along this spectrum. Some systems may be characterized as having a strong level of 'openness', whilst others may have limited 'openness'. In order to identify the level of openness, the various forms of interaction between international law and domestic law, and domestic law and European law, need to be assessed.

Against this background, the aim of the present workshop is to explore,

- first, what are the **legal factors** – sources and methods – that determine the 'openness' of national legal orders to international law and European law,
- second, who are the **actors** and what are the **politics** behind the 'openness' of national legal orders,
- and third, whether 'openness' provides a fruitful **analytical framework** for further research on the relationship between national law and international law and national law and European law.

The workshop will look for patterns among different national jurisdictions and aims at developing research hypotheses for further research.

Legal factors – sources and methods

The workshop explores what are the legal factors – sources and methods – that determine the 'openness' of national legal orders to international law and European law. In doing so, the workshop will discuss the following questions:

- Independent of whether 'openness' is applied as a distinct concept, through a functional equivalent, or implicitly, what are the factors providing and pushing for openings between domestic law and international law?
- What is the **legal basis** of 'openness' in the respective legal orders? What are the provisions in constitutional law that determine 'openness'? Can openness also be derived from legal sources below constitutional rank? What is the role of judicial practice and scholarship in the identification and development of the legal basis of openness?
- What are the **methods** that are applied to open national legal orders? How are they applied? For example, do courts engage in harmonious interpretation? If so, in which direction? Do they only interpret national law in harmony with international and European law or do they also attempt to interpret international and European law in harmony with their own national rules? What are the limits of harmonious interpretation? Another issue that could be discussed is how explicit do domestic court draw on the international courts, e.g., using references or not?
- What is the **function** of openness? Is it a residual rule (fallback rule) according to which, unless explicitly stated otherwise, international law and European law apply domestically? Is it a signpost for harmonious interpretation?
- Are there **different levels of 'openness' in relation to different sources and fields of international law and European law**? Is there a difference in relation to treaty law, customary international law, and general principles? Does the openness include decisions of international courts and tribunals? Are there differences in relationship to difference areas of international law? Are the discernable differences in relationship to different areas of European law?
- Do we find **sector specific openings in different parts of national law**? Are there qualitative and qualitative differences with regard to different parts of national law in relation to their openness?
- What is the legal **effect** of the 'openness' in the respective legal order? Does international law have a direct or indirect effect? Is there a difference in relation to the difference sources of international law or in relation to different kind of norms? What is the effect of 'openness' on the scope of judicial review exercised by national courts? How does the openness affect other

principles of national law, such as the *lex posterior* and *lex specialis* principles? Who are the addresses of openness? Are they mainly courts? Does the openness also address the national legislator and the executive? If so, with what effect?

- Is 'openness' only a **one-way street, or does it go both ways**? What is the legal effect of 'openness' of domestic courts on the international and European level? Are there examples of domestic courts influencing international courts or European courts?
- What are the **'counter-limits'** to the 'openness' of national legal orders which stipulate mechanisms for disengagement or closing of the national legal order and international law/European law under certain conditions? What is their legal basis? Are there difference kinds of counter-limits in relation to international law and European law?

Actors and politics

Moreover, the workshop explores the 'openness' of national law vis-à-vis international and European law in its wider context. Among the questions that the workshop will discuss are, for example:

- What is the **historical genesis** of a national legal system's openness?
- Who are the relevant **actors** in a legal system that play a role in its 'openness'? What is the role of educational institutions, legislators, governments, civil society in the 'openness' of a legal system? How do these actors fulfill their role?
- What are the **politics** behind openness and to what extent and how is the 'openness' of a legal system influenced by its wider political context? Are there indications that domestic/international courts think 'strategically' about citations and other signs of openness, to convince particular 'compliance constituencies' in particular directions? Can we discern patterns in the opening and closing of national legal systems? What are these patterns? Are there parts of national law that are more likely to respond to political developments? How do domestic courts draw on or restrict 'openness' in response to domestic threats to the rule of law, or calls to re-nationalize authority?
- What are **other factors** than actors and politics that influence 'openness' of a national legal systems?

Theory – 'Openness' as an analytical framework

The aim of the workshop is to gain conceptual clarity on the concept of 'openness', and furthermore to explore its potential as a useful framework for further research on the relationship between national and international law and national law and European law.

- How does the concept of openness relate to the traditional concepts on the relationship between national law and international – monism, dualism, and pluralism? Is it a perspective that adds anything to the debate? Does 'openness' provide an analytical tool, which offers a fruitful new perspective, or is it little more than new wine in old bottles?
- What is the epistemological aim and potential of discussing exploring the 'openness' of national legal orders?
- Can it serve as a neutral perspective, or does it necessarily imply a certain bias?
- Are there other concepts that are functionally equivalent, which may be more suitable?
- With what methods may we assess the 'openness' of national legal orders?

The Workshop will be organized in two sessions:

14.00-14.10 **WELCOME**

Mads Andenas, Freya Baetens Andreas Føllesdal, Geir Ulfstein, Johann Ruben Leiss

14.10- 17.00 **OPENNESS OF NATIONAL LEGAL ORDERS -– THEORY, SOURCES, AND METHOD**

14.10- 15.30 OPENNESS OF SELECTED NATIONAL LEGAL SYSTEMS – SOURCES AND METHODS

Chair and Moderation **Freya Baetens**

Johann Ruben Leiss, *Open-statehood Revisited: Developments in Germany's Openness to International Law and European Law*

Andreas L. Paulus[z], *Intervention*

Andre Nollkaemper[z], *The Total Openness of the Dutch Legal Order: Myth and Reality*

Freya Baetens, *Intervention*

Geir Ulfstein, *The (Disputed) Openness of the Norwegian Legal Order*

Jørgen Sørgard Skjold[z], *Intervention*

Agnieszka Bień-Kacała[z], *Closing the Polish Legal Order for European Union Law*

Freya Baetens, *Intervention*

Emanuel Castellarin, *Remarks on the Openness of the French Legal Order*

Hélène Tigroudja, *Intervention*

Giacinto della Cananea, *The Italian Constitutional Court: a 'Selective' Openness?*

Paolo Palchetti, *Intervention*

Ludovica Chiussi, *Intervention*

15.30 -15.45 **Coffee break**

15.45-17.00 THE CONCEPT OF OPENNESS AS AN ANALYTICAL FRAMEWORK

Chair and Moderation **Andreas Føllesdal**

Jean d'Aspremont, *The openness of legal orders as a mode of governance*

Otto Pfersmann, *Differentiated Openness in a Monist Theory. Avoiding New Words for Old Problems*

17.00 -17.15 **Coffee break**

17.15 -18.00 **OPENNESS OF NATIONAL LEGAL ORDERS – ACTORS AND POLITICS**
Chair and Moderation **Mads Andenæs**

ACTORS – OPEN DISCUSSION

POLITICS – OPEN DISCUSSION

18.00 -18.30 **CONCLUDING DISCUSSION AND OUTLOOK**
Chair and Moderation **Geir Ulfstein**

20.30 **DINNER**

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Participants

Andenas, Mads	University of Oslo; Institute of Advanced Legal Studies, School of Advanced Study, University of London; Professor II Inland Norway University of Applied Science (Lillehammer)
Azoulai, Loïc	Sciences Po
Baetens, Freya	University of Oslo, PluriCourts
Bianco, Giuseppe	Organisation for Economic Co-operation and Development (OECD)
Bismuth, Regis	Sciences Po
Canedo Arrillaga, José Ramón	University of Deusto
Castellarin, Emanuel	University of Strasbourg
Chiussi, Ludovica	University of Bologna
d'Aspremont, Jean	Sciences Po
della Cananea, Giacinto	Bocconi University
Fairgrieve, Duncan	British Institute of International and Comparative Law, Université de Paris Dauphine
Frison-Roche, Marie-Anne	Sciences Po
Furuholmen, Lucy[z]	University of Oslo
Føllesdal, Andreas	University of Oslo, PluriCourts
Hascher, Dominique	Cour de Cassation
Hébié, Mamadou	Leiden University

Hennebel, Ludovic	University of Aix-en-Provence, Advisory Committee of the UN Human Rights Council and the UN Working Group on Communications of the Complaints Procedure of the Human Rights Council
Johansen, Stian Øby[z]	University of Oslo, Guest Researcher at PluriCourts
Lambert, Elisabeth	University of Strasbourg
Leiss, Johann Ruben	Inland Norway University of Applied Science (Lillehammer), Guest Researcher at PluriCourts
Nollkaemper, André[z]	University of Amsterdam
Paolo, Palchetti	Université Paris 1 Panthéon/Sorbonne; University of Macerata
Parona, Leonardo	Bocconi University
Paulus, Andreas L.[z]	University of Göttingen, Justice at the German Federal Constitutional Court
Pfersmann, Otto	Paris I Panthéon-Sorbonne
Saul, Matthew[z]	Inland Norway University of Applied Science (Lillehammer)
Skjold, Jørgen Sørgard[z]	University of Oslo, PluriCourts
Tigroudja Hélène	Aix-Marseille University, UN Human Rights Committee
Ulfstein, Geir	University of Oslo, PluriCourts
Waibel, Michael[z]	University of Vienna
Wibye, Johan	University of Oslo, PluriCourts