1. The Bilateral Level: The EU Legal Order and International Law

The relationship between national legal order and international law has in the past been determined by a hierarchy of norms whose ranking and status were determined by monist or dualist oriented legal systems. This hierarchy of norms, however, has to be seen in the context of interpretation by judges who tend to find a more subtle way of resolving conflicts between norms in the form of the political questions doctrine or a restriction of legal control due to the division of powers. This relationship will first be addressed on the bilateral level, namely between national and/or European law and international law. However, due to multilevel systems, involving the European Union, national Member States and international organisations such as the UN and the WTO, which are engaged in multilevel regulation, the question of hierarchy between courts – and not only norms – needs consideration. Judges are faced with these different levels of multilevel regulation and different judges and courts rule on related questions. While the aspects of multilevel regulation are targeted by other contributions, this contribution aims at discussing multilevel jurisdictions. This pluralism of jurisdictions might restructure the relationship from a hierarchy of norms to a hierarchy of courts or, to the contrary, into parallel legal orders which overlap and interconnect but without clear hierarchies established between them.

One of the cardinal questions of legal theory in the nineteenth century was the relationship between national and international law. Two opposing concepts, monism and dualism, address the legal status given to international law in
the national legal order.\(^1\) While the dualist approach treats national law and international law as two separate sources of law,\(^2\) the monist concept relies on the theory of two normative systems with binding force and deriving from the same source and forming part of the same legal order. Consequently, especially with the monist system, this leads to a hierarchy of norms, even though the two approaches do not necessarily clarify the ranking between norms deriving from international and national law.\(^3\) It is difficult to draw general conclusions as constitutional provisions relating to international law have to be seen in the context of the legal practice by judges and especially constitutional courts. However, on a more general plane, dualist countries exclude any direct effect of international treaties, while monist systems rank international law above or at the same level as national legislation, but not above the constitution. All of the constitutional legal orders of the EU Member States can be identified either as monist and dualist, despite the fact that, in practice, the lines between the two categories get blurred\(^4\) and can be mainly determined on the basis of the constitutional tradition and how international law, especially international treaty law, is integrated into the national legal order or referred to in the constitutional context and by courts. In the European Union, monist countries can be identified as Poland, the Czech Republic, the Slovak Republic, Romania, Bulgaria, Slovenia, Estonia, Lithuania, Latvia, Cyprus, Belgium, France, Luxembourg, the Netherlands, Spain, Portugal, Greece and Austria, while Hungary, Italy, Germany, UK, Ireland, Malta, Sweden, Finland and Denmark can be recognised as dualist systems.\(^5\) Along the same line, the legal order of the European Community has been categorized in the literature. The majority of authors categorises the EC legal order as a monist legal one that does not differentiate between international law or European law sources.\(^6\) However, this

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\(^2\) Advocated by the German and Italian scholars Triepel and Anzilotti.


\(^6\) See for example: P. Pescatore, “Die Rechtsprechung des Europäischen Gerichtshofs zur gemeinschaftlichen Wirkung völkerrechtlicher Abkommen”, p. 661, in: *Festschrift*