THE CONCEPT OF THE LEGAL ORDER*

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In Section I, Kelsen introduces the legal order as an aggregate of norms and considers the question of the basis of the validity of a norm. He then turns, in Section II, to a series of questions that arise in connection with “unconstitutional” statutes. Finally, in Section III, Kelsen defends at length a monistic interpretation of the relation between the international and domestic legal orders. (Translator's summary.)

I

A LEGAL ORDER IS AN aggregate or a plurality of general and individual norms that govern human behavior, that prescribe, in other words, how one ought to behave. That behavior is prescribed in a norm or, what amounts to the same thing, is the content of a norm means that one ought to behave in a certain way. The concept of the norm and the concept of the “ought” coincide. To prescribe in a norm how one ought to behave is understood here not only as a command but also as a positive permission or an authorization.

A plurality of norms is an order if the norms constitute a unity, and they constitute a unity if they have the same basis of validity.

If the law is positive law, the norms of a legal order are “posited” or “created” through human acts. To say that a norm prescribing how one ought to behave is “posited” or “created” through an act is a metaphorical way of saying that the norm is the subjective meaning of the act. Acts through which the norms of a legal order are posited or created comprise legislative acts, acts constituting legally binding cus-


Translator’s footnotes, in brackets, are flagged with lower-case letters in the text; Kelsen’s own footnotes are numbered.

The essay reflects doctrines that Kelsen developed at greater length in his last full statement of the Pure Theory of Law, the Reine Rechtslehre (2d ed. 1960). This work is cited at one point in the footnotes, with references to section numbers rather than page numbers to facilitate use of the English edition (M. Knight transl. 1967).

1. The means whereby legal norms are distinguished from other norms remains an open question here.
tom, judicial acts, administrative acts, and private law transactions, in particular contracts. These acts are characterized here as legal acts, and the individuals authorized by the legal order to perform such acts are characterized as legal officials.

To say that a legal norm is “valid,” that it has “validity,” or, what comes to the same thing, is binding is to say that the subjective meaning of the act through which the norm is posited is also interpreted as its objective meaning. The subjective meaning of an individual’s act intentionally directed to certain behavior of another individual is not always also interpreted as the objective meaning of the act. Subjective meaning is interpreted as objective meaning—the norm that is the subjective meaning of the act is regarded as a valid norm, binding on its addressee—only if two conditions obtain: First, act A₁, whose subjective meaning is the norm in question, is prescribed as an “ought” in another norm, which is, in turn, the subjective meaning of act A₂, intentionally directed to A₁. Second, the subjective meaning of act A₂ is also interpreted as its objective meaning. The norm posited through act A₂ and interpreted as the objective meaning of act A₂ is the basis of the validity of the norm posited through act A₁. It is, figuratively speaking, the higher norm, serving as the basis of the validity of the lower norm.

The question of the basis of the validity of a norm, that is, the question of why a norm is valid, why a norm is binding, why one ought to comply with a norm, is the question of why the subjective meaning of an act intentionally directed to a certain course of behavior is also interpreted as its objective meaning. The answer to this question lies in the appeal to a higher norm. The basis of the validity of a norm, an “ought,” can only be another norm, another “ought”; it cannot be a fact, an “is,” and therefore cannot be the act positing this or another norm either. An “ought” follows only from an “ought,” not from an “is,” just as an “is” follows only from an “is,” not from an “ought.” To be sure, it is said that we ought to comply with a certain norm, the norm, say, that we love our neighbor, because God commanded it, that is, because God posited this norm. But the proposition expressing as the conclusion of a syllogism the norm that we ought to love our neighbor presupposes a major premise expressing the norm that we ought to obey God’s commands and a minor premise expressing the fact that God has commanded that we love our neighbor. Both the major and minor premises are indeed conditions of the conclusion, for if we ought to obey God’s commands and if God has commanded that we love our neighbor, then we ought to love our neighbor. The two premises differ, however, in that the conclusion, expressing an “ought,” is contained only in the major premise, which also expresses
an "ought"; it is the particular contained in the general. The conclusion is not contained in the minor premise, which expresses an "is." Therefore only the major premise expresses the basis of validity. It is the _conditio per quam_, the minor premise, a _conditio sine qua non_.

The validity of a legal norm, a legal "ought," can indeed be derived only from a norm and not from a fact, an "is." Still, there is a certain connection between the legal "ought" and the "is" inasmuch as a general legal norm, in order to be regarded as valid, must not only be posited through an act, an "is," but must also be efficacious to a certain degree, that is, must on the whole actually be applied and complied with. A general norm that is not applied and complied with at all is not regarded as valid; and it is nonsense to posit a norm prescribing how one ought to behave when it is known from the outset that the behavior in question must ensue as a matter of natural necessity. There must exist the possibility of behavior that conflicts with the norm. Therefore validity cannot be identified with efficacy.

The appeal to the basis of the validity of a legal norm cannot go on interminably. It leads in the end to an act whose subjective meaning, a norm, cannot be interpreted on the basis of positive law as its objective meaning. That is, this last act cannot be said to be prescribed as an "ought" in another norm, a positive legal norm, which is in turn the subjective meaning of a legal official's act. The subjective meaning of this last act can only be _presupposed_ as its objective meaning. That is, those who interpret the acts in question as legal acts can only _presuppose_ that the norm that is the subjective meaning of this last act is a valid legal norm, binding on its addressee. (This act is the last act in the intellectual process leading to the basis of the validity of a legal norm, but the first act in the law-making process.)

The norm that is the subjective meaning and, in virtue of the presupposition, also the objective meaning of this last act is the basis of the validity of all other legal norms belonging to a legal order. It is the constitution of this legal order. Its essential function is to regulate the creation of the legal order, that is, to regulate the officials through whom and the procedures whereby the general norms of the legal order are created. The presupposition that the subjective meaning of the act giving rise to the constitution is also its objective meaning, that the norm posited through this act is a valid, binding legal norm and that therefore one ought to behave as the constitution prescribes, is characterized here as the _basic norm_.

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a. [That is to say, it is the constitution of this legal order in the "juridical-logical sense" and not in the sense familiar from the positive law. For a clear statement see Kelsen's italicized line in the penultimate paragraph of Part I of the essay _infra_.]
The following example illustrates the appeal to the basic norm of a legal order. A domestic legal order, that is, a legal order commonly characterized as the law of a state and distinguished from international law, is all that will be considered at the outset.

When an individual, giving expression to his will, demands that another individual behave in a certain way, the subjective meaning of his act is described not by saying that the individual to whom the act is intentionally directed will behave in the way specified but only by saying that he ought so to behave. The subjective meaning of the act demanding that another individual behave in a certain way is therefore a norm. But this norm is interpreted as an objectively valid norm, binding on its addressee, only if one assumes that the act whose subjective meaning is the norm in question is prescribed by an objectively valid norm. If a gangster demands of us a certain sum of money, perhaps we will comply with his demand. We will not, however, interpret it as a norm, legally binding on us, as we interpret the analogous demand of a tax official or a court. Why do we interpret the subjective meaning of the act of a tax official or a court as its objective meaning, an individual norm as a valid individual norm, legally binding on us? It is because this act is authorized by a general norm enacted in the legislature, authorized, that is, by a statute. The general norm of the statute is the subjective meaning of an act of a particular individual or an act representing the majority decision of a particular assembly of individuals. Why do we interpret the subjective meaning of this legislative act as its objective meaning, that is, as a valid norm, binding on us? It is because this act is authorized by the constitution, because, in other words, this act is specified as a law-creating act in the constitution. We assume here that this constitution is, historically, a first constitution and that it was adopted by an assembly of particular individuals, the "founding fathers," meeting at a particular time in a particular place. This constitution is a norm, a norm that is the subjective meaning of the act through which it was posited. Why do we interpret the subjective meaning of this act as its objective meaning, why, that is, do we interpret the constitution as a valid norm, binding on us? Here we can no longer answer by appealing to a posited norm—not, that is, if we forego a metaphysical justification of the legal order, the assumption that the founding fathers were authorized by God or another superhuman authority to adopt the constitution. The constitution is the subjective meaning of the act giving rise to it, like the subjective meaning of any demand made on us by just anyone, but it is also the objective meaning of this act, which is to say that the constitution is a valid norm, legally binding on us, and that we ought therefore to comply with it, we
ought to behave as it prescribes. This valid norm can only be presupposed, and it is presupposed when one interprets the subjective meaning of the norm-creating acts in conformity to the constitution as their objective meaning; when one interprets the norms that are the subjective meaning of these acts as objectively valid, binding legal norms; when one interprets the relations established by these norms as legal relations, that is, as legal duties, rights, and powers. This presupposition is the basic norm of a legal order whose norms are created in conformity to the constitution. One can characterize it as a constitution in the juridical-logical sense, in contradistinction to the constitution of the positive law, adopted through the act of a legal body. Consider the judgment through which the subjective meaning of the act giving rise to the constitution is interpreted as its objective meaning, likewise the judgments through which the subjective meaning of the acts in conformity to the constitution is interpreted as their objective meaning—the judgments, in other words, through which the norms that are the subjective meaning of these acts are interpreted as objectively valid, binding norms. If a concept from Kant's theory of knowledge may be applied by analogy, the presupposition of the basic norm is the transcendental-logical condition of such judgments. The presupposition of the basic norm is the condition that legal theory has arrived at through an analysis of such judgments. Only through the presupposition of the basic norm are these judgments and the interpretations stemming from them possible.

The basic norm establishes as a law-creating fact only the act giving rise to the constitution, establishes, then, customary practice as a law-creating fact if the constitution evolves therefrom. The basic norm regulates directly only the fact through which the constitution is to be created, indirectly the facts through which the norms of the legal order—in conformity to the constitution—are to be created. The basic norm is the basic regulator of the creation of the legal order. It does not regulate in any way the content of the constitution, neither the content of norms posited through the act giving rise to the constitution nor the content of norms to be created in conformity to the constitution. The content of these norms is regulated solely by the acts through which they are posited, and these norms can have any content whatever. No norm created in conformity to the basic norm can be denied validity on the ground that it conflicts with morality, in particular, with a standard of justice. Since some degree of efficacy is a condition of validity, the basic norm has reference only to an efficacious constitution, and a constitution is efficacious if the norms created in conformity to it are by and large applied and complied with.
II

The foregoing remarks show that a legal order is not a plurality of valid norms on the same plane but rather a hierarchical structure (Stufenbau) of superior and subordinate norms. The higher norm is the norm that regulates the creation of another norm, the lower norm, and is thus the basis of the validity of this lower norm. The higher norm can also regulate in varying degrees the content of the lower norm. The norms of the constitution guarantee certain freedoms, of expression, say, or of religion, or guarantee equal treatment of citizens with respect to differences, in race, say, or in religion, by precluding limitations on these freedoms and consideration of these differences. In so doing, the norms of the constitution regulate not only the enactment but also the content of prospective statutes. Similarly, the general norms of statutes regulate not only the creation but also to a greater or lesser extent the content of the individual norms issued through courts and administrative agencies, whose acts represent applications of the law. Finally, the higher norm, governing the creation of the lower norm, can also regulate both the spatial and temporal spheres of validity of the lower norm.

The presupposed basic norm of a legal order, which establishes that the fact through which the constitution is adopted is the basic fact of the creation of the norms of this legal order, is the basis of validity common to all legal norms belonging to this legal order. As such, the basic norm constitutes the unity in the plurality of legal norms created in conformity to it. The basic norm of a legal order (Rechtsordnung), as the basic regulator of the creation of the law, represents a dynamic principle, to be distinguished from the basic norm of a system of norms (Normensystem), which represents a static principle. The norms of such a system of norms are valid not because their creation conforms to a basic norm regulating norm-creation but because their content conforms to a presupposed basic norm, to which they are related as particular to general. For example, the norms that one ought not to lie, one ought not to deceive, one ought to keep one's promises, one ought not to bear false witness can be derived from the basic norm prescribing veracity, and this by way of a purely mental operation. There is no need here for an act of will to create these particular norms, as there is in the case of a basic norm representing the dynamic principle.

The unity of a legal order is the unity of a network of generative relations. That a legal order can be described in noncontradictory propositions is another expression of this unity. The possibility cannot be denied, of course, that the acts of legal officials, which have norms
as their subjective meaning, in fact conflict with one another. But where one norm prescribes A as obligatory and a second prescribes non-A, these norms cannot be regarded as simultaneously valid. Where it is a matter of legal norms at the same level in the normative hierarchy, two general norms, for example, enacted by the legislature at different times, with the one prescribing behavior as obligatory that is the opposite of that prescribed by the other, then the later norm repeals the validity of the earlier one, according to the principle lex posterior derogat priori, which is applicable in this same legal order. If the acts through which the norms in question are posited take place at the same time—if, for example, one and the same statute contains mutually exclusive prescriptions—then we have no meaningful act whatever, we have no act whose subjective meaning can also be interpreted as its objective meaning, and we therefore have no objectively valid norm either. Two points should be noted here. The conflict is only apparent where the statute allows the interpretation that the legislator has empowered the appropriate legal official to apply either one of the two norms, has in other words left to the official the choice between the two. Second, where the two norms conflict only partially, the validity of the one is to be seen as limited by the validity of the other.

A conflict between legal norms at different levels in the normative hierarchy cannot take place, for the norm at the higher level is the basis of the validity of the norm at the lower level. A lower-level norm is valid only because it conforms to a higher-level norm, namely, the norm that governs its creation; that is to say, the lower-level norm is created as the higher-level norm prescribes. To be sure, one speaks of an “unconstitutional” statute, but this terminology is misleading. If that which represents itself as a statute is regarded as null and void from the beginning, then we have no statute whatever, no valid norm. If, however, as usually happens, a valid statute is characterized as unconstitutional, a statute, say, that restricts the freedom of expression guaranteed in the constitution, then two kinds of cases are to be distinguished. In the one case, a constitution provides that such a statute can indeed be invalidated—albeit in a special proceeding designed for this purpose and not merely through a later statute by means of the lex posterior principle—but that it is valid right up to the moment of its invalidation. Invalidation can be effected erga omnes, that is, generally, and even with retroactive force, though the latter, for obvious reasons, is the exception. Or, if the court is empowered not to apply what it regards as an “unconstitutional” statute—one that according to its meaning is to be applied in the concrete case—and so decides the case instead without regard to the statute, then the result is
that the statute is set aside through a judicial decision that is simply *inter partes*, that applies solely to the parties to the concrete case.\(^{b}\) The statute, *in conformity to the constitution*, then remains valid; that is, it is to be applied in other cases by other courts that do not regard it as "unconstitutional" and even by the same court if, as actually happens, that court changes its opinion on the constitutionality of the statute. The constitution allows for the possibility even of a statute that, in the opinion of the legally competent officials, limits freedom of expression; the constitution establishes, however, the possibility of invalidating such a statute. The so-called "unconstitutional" statute is a statute in conformity to the constitution while and insofar as it is valid, that is, has not been invalidated; it is not null and void but simply nullifiable in a special proceeding.

In the second kind of case in which a valid statute is characterized as "unconstitutional," a constitution guarantees certain freedoms or equality of citizens (as indicated above), but does not allow for the possibility either that a statute restricting these freedoms or this equality can be invalidated *erga omnes* in a special proceeding (of the sort indicated above) or that such a statute can be set aside in a judicial decision providing simply *inter partes* relief. The result is that not even the courts are empowered to forbear from applying a statute of this kind in the concrete case, and therefore even the "unconstitutional" statute is, on the authority of the constitution, to be applied and complied with as valid. As a valid statute then, this statute is in conformity to the constitution. The constitutional provisions that guarantee certain freedoms and equality of citizens must be regarded as legally irrelevant. The designation of statutes that do not conform to these constitutional provisions as "unconstitutional" has no legal significance; like the designation of a statute as unjust, it is only morally or politically significant. That a legal instrument characterized as a constitution can contain legally irrelevant material is undeniable. Such an instrument often contains political and legal doctrines as well as other expressions that lack altogether the subjective meaning of norms and therefore cannot be objectively interpreted as norms, that is, as law.

The constitutional provisions guaranteeing certain freedoms and equality of citizens can, to be sure, acquire legal relevance. Suppose that executive officials participate, in their capacity as head of state or member of cabinet, in enacting statutes that, though to be regarded as valid, fail to conform to these constitutional provisions. The constitution can provide that these officials be held accountable, that is, that they be punished in a special proceeding. If, however, these “unconstitutional” statutes cannot be invalidated in a proceeding of the sort indicated above but rather remain valid on the authority of the constitution, that is, are to be applied and complied with, then owing to their validity they must be regarded, legally speaking, as being in conformity to the constitution. Their so-called “unconstitutionality” does not mean that they are in contradiction to the constitution but rather that certain state officials are held accountable for them.

Analogous considerations apply to so-called “illegal” judicial decisions. They are either null and void from the beginning and are therefore not valid norms at all but only apparently valid, or they are nullifiable through official channels of appeal but valid until nullified—valid, indeed, on the authority of the statute that in being applied gave rise to them. This statute allows for the possibility even of “illegal” judicial decisions but allows at the same time for the possibility of overruling them in a regulated proceeding; since the “illegality” of the decision is established in the proceeding, the possibility of overruling a valid legal decision is in effect actually established. Such a proceeding, and with it the provision that a judicial decision remains valid until overruled by a legally competent official in the prescribed proceeding, is indispensable lest the legal order empower everyone to conclude that a judicial decision is illegal and to forbear then from complying with it—what for obvious reasons does not happen if the legal order establishes a system of courts. So-called “illegal” decisions are, as valid decisions, individual legal norms in conformity to the law; they are not null and void but simply nullifiable. If the doctrine of finality is recognized with respect to the decisions of the highest appeals court, a judicial decision of that court can no longer be overturned as “illegal” in a legal proceeding. The decision then remains valid and thus in conformity to the law, “legal,” even if someone without authority designates it “illegal.” To summarize, the legal situation is described as follows: The legal order not only empowers the officials who apply the law to posit an individual norm corresponding to a general norm, one that specifies beforehand in a statute the content of the individual norm, but also empowers them to posit an individual norm not corresponding to this general norm. We have a norm conflict, therefore, neither in the case of the
so-called "unconstitutional" but valid statute nor in the case of the so-called "illegal" but valid judicial decision.

III

It is customary to regard as two distinct objects the legal order (Rechtsordnung) and the legal community (Rechtsgemeinschaft), the law and the state in the case of a domestic legal order; it is customary to speak of the law of a state. But the legal community, that which is common to the people whose behavior a legal order governs, is nothing other than this legal order. These people, it is said, form a legal community, belong to a legal community only insofar as their behavior is governed by a legal order, is regulated, in other words, by the norms of this legal order. The state is a social order, and because this social order is a legal order, the state is a legal order; the state is that legal order of which one says: The legal order is the "law of the state," the state creates this law. In fact, however, the norms of the legal order are created by individuals who are empowered by the legal order to do so. It is a property peculiar to the law that it governs its own creation and application. To say that the state creates the law is to attribute the law-creating and law-applying function of certain individuals to the personified unity of the legal order. But not every legal order is a state. A state is a relatively centralized legal order, a legal order that, for the creation and application of its norms, establishes legal bodies whose functions reflect a division of labor, that is, legislative, judicial, and administrative bodies. A primitive legal order, which establishes no such legal bodies, whose norms are created by way of customary practice and are applied by the legal subjects themselves, is therefore not characterized as a state. A decentralized legal order of this nature is international law.

Because there is a plurality of states, that is, domestic legal orders, the question arises as to how, on the one hand, domestic legal orders are related to one another and how, on the other hand, they are related to the international legal order.

Since the relation of the states or domestic legal orders to one another is regulated by the international legal order, its relation to the individual domestic legal orders should be examined here first. In this connection international law will be understood as so-called general international law, comprising norms that are created through customary practice of the states and that—in substance—govern the reciprocal behavior of the states, that is, the behavior of those individuals who, pursuant to the domestic legal orders, function as state governments. An example of a norm created through customary practice is
the norm *pacta sunt servanda*. It empowers the states, within the framework of general international law, to govern by treaty their reciprocal relations. The norms created through state treaty bind only those states that are party to the treaty. Such norms belong to particular international law and represent a lower level of the international legal order than that represented by the norms created through customary practice of the states. A still lower level comprises the norms posited by those international bodies that are established by state treaty. Since the highest level of the international legal order comprises the norms of general international law, which are norms created through customary practice of the states, the basis of the validity of all norms of international law is the basic norm: States ought to conduct their affairs as they are accustomed to conducting them. This basic norm establishes customary practice of the states as a law-creating fact. It is the constitution of international law.

The question of the relation between the international legal order and an individual domestic legal order is simply a special case of the relation between two normative orders. As shown above, two norms that contradict one another, that command incompatible behavior, cannot be regarded as simultaneously valid. And the only norms that cannot contradict one another, that cannot conflict, are those that have the same basis of validity and thus form a unity, form a normative order, a system of norms. Therefore two normative orders that do not have the same basis of validity cannot be regarded as simultaneously valid. c This is clearly shown in the relation between a moral order, say, Christian morality, and the positive law. Christian morality, having as its basic norm the precept that one ought to obey the commands of Jesus, thereby embraces the norm that one not judge others lest one be judged and also the norm that one love one’s enemies; Christian morality must therefore conflict with every legal order that embraces a norm prescribing that one ought to judge others and a norm authorizing the waging of war. The jurist, who regards the law as a system of valid norms, must therefore disregard the moral order as a system of valid norms, and likewise the moralist, who regards Christian morality as a system of valid norms, must disregard

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c. [The argument here leaves a good deal to the imagination and can be filled out by drawing on Kelsen’s statements on norm conflicts and on inter-systemic conflicts in the *Reine Rechtslehre* (2d ed. 1960), at §§ 16, 34(e), 43. In his later work, above all in the *Allgemeine Theorie der Normen*, K. Ringhofer and R. Walter, eds. (1979), Kelsen presents a view of norm conflicts very different from that sketched in this essay and in the *Reine Rechtslehre* (2d ed. 1960).]
the law as a system of valid norms. This does happen as a matter of fact and is expressed when one says that from the standpoint of Christian morality, judging others and waging war are indeed forbidden, but from the standpoint of the law, both are commanded or at any rate permitted. That, however, is to say nothing other than that there is no standpoint from which morality and law can be regarded as simultaneously valid normative orders. There is, to be sure, a Christian morality, namely that represented by St. Paul, according to which it is a divine command to yield obedience to every authority, that is, every positive legal order. Then the other divine commands are valid only insofar as their validity is not limited through norms of a system of positive law, and every positive legal order is understood as a member order within an all-encompassing moral order. The basic norm of this moral order, that one ought to obey the commands of God, is then also the ultimate basis of the validity of the member legal order, that is, the legal order delegated by a norm of this moral order.

Two normative orders of the dynamic type can be regarded as simultaneously valid only if they have the same basis of validity, that is, the same basic norm, thereby forming a unified system of norms. Their reciprocal relation, therefore, can have only one or the other of the following forms: Either the one order is subordinate to the other because the latter contains a norm that is the basis of the validity of the former, or else both orders are ranked equally, meaning that they are delimited from one another in their spheres of validity and thus cannot conflict with one another. This, however, presupposes a third, higher order containing a norm that is the basis of the validity of both of the other orders, that delimits their spheres of validity and thus above all coordinates the two orders. Since orders so coordinated have their basis of validity in the higher order, it can be understood as a comprehensive order encompassing both lower orders as member orders. The basic norm of the higher order is the ultimate basis of the validity of both lower orders and is their indirect basic norm, mediated through the norm of the higher order that is the direct basis of their validity.

If, as is usually assumed, international law and domestic law are simultaneously valid legal orders, then they must form a unity, and their reciprocal relation can only correspond to one or the other of the two types of relations described here. Both constructions of their relation are possible. Whether one arrives at the first or the second depends on whether, in constructing the relation, one takes as one's point of departure a domestic or the international legal order. The one construction represents the primacy of domestic law, the other, the primacy of international law. Both constructions are monistic in char-
acter. The dualistic construction frequently defended in traditional jurisprudence is, on the other hand, logically untenable. To be sure, international law and domestic law are taken to be simultaneously valid, but they are regarded as distinct legal orders, independent of one another with respect to their validity, because—as assumed in this theory—insoluble conflicts can and in fact do arise between them.

If, in constructing the relation between international law and domestic law, one takes as one's point of departure the validity of the domestic legal order and if one regards international law as a valid legal order, one must answer the question of what the basis of the validity of the international legal order is; and the basis of its validity can only be found in the domestic legal order that serves as the point of departure in constructing the relation. This answer, then, can only be: International law is valid for a state because it is recognized by that state, that is to say, recognized through an act that is in conformity to the domestic legal order—recognized, say, in the state's constitution. International law, then, in the form it has at the point of its recognition through state customary practice, is valid as a component of the domestic legal order that serves as the point of departure for the construction. This domestic legal order (in a broader sense) has another component, which comprises the norms created in conformity to the constitution through the state legislative, adjudicative, and administrative processes (the domestic legal order in a narrower sense). The basis of the validity of international law is therefore the basic norm of the domestic legal order that serves as the point of departure for the construction. Only one state can serve as the point of departure for this construction, and it is in point of fact the state of that individual who is interpreting in this way the relation between international law and domestic law. That is how the unity of international law and domestic law is established on the basis of the primacy of domestic law.

Similarly for what is presented as the dualistic theory. Its proponents also base the validity of international law on its recognition by the state for which it is valid. But the dualism of international law and domestic law is thereby abandoned. In the dualistic theory international law and domestic law are regarded as simultaneously valid, and the validity of international law for a state is based on recognition by that state, or, formulated in the usual way, the theory bases the validity of international law on the "will of the state" and thereby on the very same "will" that the validity of the domestic law is based on. In so doing, the dualistic theory precludes the possibility of conflicts between international law and domestic law, the very possibility assumed in the theory. In fact it can be shown that domestic law said
to conflict with international law does not represent a genuine norm conflict any more than does a statute said to conflict with the constitution. It can be shown that the situation in which international law and domestic law are regarded as simultaneously valid can and must be interpreted just as is the situation in which a state's constitution establishes certain freedoms and equality of citizens but does not allow for the possibility of invalidating statutes that restrict these freedoms or this equality; even these statutes remain valid, though the constitution does provide that specific sanctions ought to be imposed on those officials who participated in enacting the statutes. International law, while it prescribes a certain course of state behavior by attaching a sanction to the opposite course of behavior, does not allow for the possibility of invalidating a domestic legal norm that prescribes the latter. The domestic legal norm remains valid even under international law. International law prescribes only that in such a case a specific sanction ought to be imposed on the state. What one characterizes as domestic law "in conflict with international law" is a domestic legal norm, issuance and enforcement of which is the condition of a sanction established by international law. The situation here can be described without logical contradiction. In that the dualistic theory regards international law and domestic law as simultaneously valid and bases the validity of international law on its recognition by the state, the theory fulfills, unwittingly as it were, the epistemic requirement of all law in a system, namely, that from one and the same standpoint it is to be understood as a whole that can be described without contradiction. In the end the theory amounts to a monistic construction of the relation between international law and domestic law, a construction that takes as its point of departure the validity of a domestic legal order and thereby the primacy of domestic law.

If, in constructing the relation between international law and domestic law, one takes as one's point of departure a domestic legal order, then the question arises as to the basis of the validity of international law. And the answer to this question can only be found in the primacy of the domestic legal order. If, on the other hand, one regards international law as a valid legal order, then it too can be taken as one's point of departure, in which case the question arises as to the basis of the validity of the domestic legal order. And here the answer must be found in international law. This is possible, for international law governs the behavior of those individuals who, pursuant to the domestic legal orders, function as state governments, and it must therefore prescribe what for its purposes a state is. That is, international law must prescribe under what conditions individuals are to be seen as the government of a state, and so under what
conditions the normative order on the basis of which they function is to be seen as a valid legal order and under what conditions their acts are to be seen as state acts, as legal acts for purposes of international law. Positive international law prescribes that individuals are to be seen as the government of a state if they are independent of other similar governments and if they are able to secure continuing obedience to the normative order on the basis of which they function from the people whose behavior is governed by this order, if, in other words, this relatively centralized normative order, subordinate only to international law, is by and large efficacious, never mind how the individuals functioning on the basis of the normative order as government officials have come by their position. This means that the community constituted by such a normative order is a state, that the normative order constituting this community is a valid legal order for purposes of international law. Here the principle of efficacy, which plays a decisive role in positive international law, serves as a legal principle.

International law establishes further that the territory of this state, the spatial sphere of validity of the domestic legal order, extends as far as this order is continuously efficacious and that all people living within this territory, with certain exceptions specified by international law, are subject to this and to no other domestic legal order. According to international law, then, each state is in principle allowed to put in an appearance only within its own territory, the territory guaranteed to it by international law. That is to say, without metaphor, that the individual domestic legal order is to establish the legal acts designated as state acts only for the sphere of validity conceded to it by international law and that it is only within this sphere that these acts can be performed without violating international law. In this way the spatial contiguity of a plurality of states, that is, a plurality of legal orders, becomes legally possible.

International law regulates not only contiguity in space but also succession in time, that is, the temporal sphere of validity of the individual domestic legal orders. The beginning and the end of the legal validity of a domestic order are governed by the legal principle of efficacy. Seen from this standpoint, the rise and the fall of the state appear as legal phenomena just as, within the framework of domestic law, the forming and the dissolution of a corporation appear as stages in the life of a legal person.

International law is also of significance in connection with the material sphere of validity of the individual domestic legal order. Since the norms of international law, especially those created by international treaty, can take up all possible issues, even those for-
merly governed by the individual domestic legal orders, the material
sphere of validity of these orders is restricted by international law. To
be sure, the individual states remain in principle competent under
international law to regulate everything, but they retain this com-
petence only insofar as international law does not take over an issue,
thereby withdrawing it from unhampered regulation by the individ-
ual domestic legal order. The latter no longer has jurisdiction, not if
one takes international law to be a legal order superior to domestic
law. But the domestic legal order does have, basically, claim to total
jurisdiction, a claim restricted only by international law. That is, the
domestic legal order is not restricted from the outset by international
law to certain issues as are other legal orders or legal communities
immediately subject to international law, namely, those constituted
by international treaty. In this latter case, the state's legal existence
appears to be regulated in every direction by international law; the
state appears, that is, as a legal order whose validity and sphere of
validity are delegated by the international legal order. The interna-
tional legal order alone, not any domestic legal order, is sovereign. If
the domestic legal orders or the legal communities constituted by these
orders, the states, are characterized as "sovereign," this simply means
that they are subordinate to the international legal order alone, which
is to say that they are immediately subject to international law.

Here one expects the objection that the individual state cannot be
understood as an order delegated by international law; after all, states—individual domestic coercive orders—must precede, histori-
cally speaking, the formation of general international law created
through customary practice of the states. This objection, however, is
based on an inadequate distinction between the historical connection
of facts and the logical connection of norms. The family, for example,
is a legal community older than the centralized state, encompassing
many families; nevertheless, the domestic legal order, the state, is
today the basis of the validity of family law. Similarly, the validity of
a domestic legal order that is a member of a federation traces back to
the constitution of the federation, although the formation of the indi-
vidual order precedes the federation of individual states, which were
once independent and only later joined together in a federal state.
One must not confuse the historical connection with the normative-
logical connection.

Where does the difference between the two monistic constructions
lie? From the standpoint of the primacy of the domestic legal order,
the condition of the validity of international law for a given state is its
recognition by that state; international law, then, is valid only as a
component of a domestic legal order. In terms of content it is the same
international law that, from the standpoint of the primacy of the international legal order, is valid as a legal order delegating and superior to all domestic legal orders. The difference between the two monistic constructions of the relation between international law and domestic law reaches only to the basis of the validity of international law, not to its content. The first construction takes as its point of departure the validity of a domestic legal order. The basis of the validity of international law, according to this first construction, is the presupposed basic norm that establishes as a law-creating fact the adoption of the first constitution, historically speaking, of the state whose legal order serves as the point of departure for the construction. The second construction takes as its point of departure not a domestic legal order but international law instead. The basis of the validity of international law, according to this second construction, is the presupposed basic norm that establishes as a law-creating fact the customary practice of the states. The customary practice of the states is also a law-creating fact within the framework of international law valid only as a component of a domestic legal order; it is, however, a law-creating fact not in virtue of a merely presupposed norm to that effect but rather in virtue of a norm actually posited through the act of recognition. In the end this norm has as its basis of validity the presupposed basic norm of the domestic legal order that serves as the point of departure for the construction, and it is as a component of this same domestic legal order that international law is valid.

Since the content of international law is the same in both cases, its function is the same in both cases: By means of its principle of efficacy, international law determines the basis and the sphere of the validity of the domestic legal orders. One of these domestic legal orders serves as the point of departure for the construction presupposing the primacy of the domestic legal order, which, then, embraces international law qua component. This can be only one domestic legal order, though any one whatever, and obviously it is in point of fact the domestic legal order of that individual who is interpreting the relation between international law and domestic law from the standpoint of the primacy of the domestic legal order and who presupposes his own state as sovereign. If one regards international law as a component of a domestic legal order, then, as already indicated, a distinction must be made between the domestic legal order in a narrower and in a broader sense. The domestic legal order in a narrower sense comprises the norms of the constitution of the state and the norms posited in conformity to this constitution through legislative, adjudicative, and administrative acts. The domestic legal order in a broader sense is the legal order that serves as the point of departure for
the construction insofar as that legal order also encompasses recognized international law, that is, the norms created through customary practice of the states; to that extent it is a domestic legal order not in the narrower sense mentioned above but in a broader sense. International law, a component of this domestic legal order, determines by means of its principle of efficacy the basis of the validity of all domestic legal orders—the basis of the validity of those legal orders that are not the point of departure for the construction as well as of the legal order that is, the legal order of which international law is a component. In the latter case, however, international law, as a component of the domestic legal order in the broader sense, performs this function only in reference to the domestic legal order in the narrower sense. As a result the relation of the two components of this domestic legal order in the broader sense is not that of two orders on the same plane but rather that of a superior and a subordinate order. The component representing international law is superior to the component representing the domestic legal order in the narrower sense. One expresses this figuratively by saying that the state that recognizes international law thereby subjects itself to international law. The principle of efficacy of international law *qua* component of the domestic legal order is not, however, the ultimate basis of the validity of the domestic legal order in the narrower sense. Its ultimate basis of validity is its presupposed basic norm, which is simultaneously the ultimate basis of the validity of international law as a component of this legal order. Only between this domestic legal order in the broader sense and the international legal order it embraces does there exist the relation between international law and domestic law characterized here as the primacy of the domestic legal order.

International law performs another function by means of its principle of efficacy, namely, restricting the sphere of the validity of domestic legal orders; and, as a component of an individual domestic legal order, it performs this function too only in reference to the other component of this legal order, the domestic legal order in the narrower sense. Only the sphere of validity of the latter is restricted by international law as a component of the domestic legal order in the broader sense. The principle of efficacy of international law as a component of the domestic legal order is not, however, the ultimate basis of the validity of this restriction; here again, the ultimate basis of validity is the presupposed basic norm of the domestic legal order of which international law is a component.

The relation of the other domestic legal orders to international law, where the former are considered from the standpoint of the domestic legal order that serves as the point of departure for the construction
and that encompasses international law, differs in only one respect from the relation based on the primacy of the international legal order: The principle of efficacy of international law is not the ultimate basis of the validity of these other domestic legal orders and not the ultimate basis of the validity of the restriction of their sphere of validity either. The ultimate basis of validity, from the standpoint of the domestic legal order that serves as the point of departure for the construction, is the presupposed basic norm of this domestic legal order. This legal order, then—taken in its broader sense, encompassing recognized international law—is alone sovereign in the sense of being a highest legal order, above which no higher order is presupposed. Yet within this domestic legal order in the broader sense, one component, namely the domestic legal order in the narrower sense, is subordinate to the other component, namely the international legal order; and thus the domestic legal order in the narrower sense is not sovereign but is, rather, immediately subject to international law, as are the other domestic legal orders, those that are not the point of departure for the construction. The domestic legal order that serves as the point of departure for the construction, in virtue of having international law as a component, becomes a universal legal order that delegates and encompasses all other domestic legal orders. The end result is the same as that following from the primacy of the international legal order: the epistemic unity of all valid law.

The antithesis between the two monistic constructions can be compared to that between the geocentric world view of Ptolemy and the heliocentric world view of Copernicus. Just as one's own state is the center of the legal world according to the first of the constructions, so in the Ptolemaic world view our planet earth is the center with the sun revolving around it. And just as international law is the center of the legal world according to the other construction, so in the Copernican world view the sun is the center with the earth revolving around it. But this antithesis of two cosmic world views is merely an antithesis of two distinct systems of reference. As Max Planck writes: "If one assumes, for example, a system of reference firmly anchored to our earth, one has to say that the sun moves in heaven; if on the other hand one shifts the system of reference to a fixed star, then the sun is at rest. The antithesis of these two formulations is neither contradictory nor obscure; it is simply a matter of two distinct ways of looking at things. According to the theory of relativity, which today can surely be regarded as well established in physics, the two systems of reference and the corresponding ways of looking at things are equally correct and equally justified; it is in principle impossible, without being
arbitrary, to decide between them on the basis of this or that measure-
ment or calculation." 2 The same is true of the two legal construc-
tions of the relation between international law and domestic law. Their
antithesis rests on the difference between two distinct systems of refer-
ence. The one is firmly anchored in the domestic legal order of one's
own state, the other in the international legal order. Both systems of
reference are equally correct and equally justified. It is impossible, on
the basis of deliberations in legal theory, to decide between the two.

Legal theory can only describe both systems of reference and de-
declare that one or the other must be accepted if the relation between
international law and domestic law is to be determined. The decision
itself lies outside the realm of legal theory and can be arrived at only
by means of nontheoretical considerations, for example, those of a
political nature. An individual who values the notion of the sover-
eignty of his state, because in his heightened self-awareness he identi-
fies with his state, will prefer the primacy of the domestic legal order
to that of the international legal order. An individual who values
more the idea of a world legal order will prefer the primacy of
international law to that of domestic law. That does not mean that
the theory of the primacy of the domestic legal order would be less
propitious for the ideal of a world legal order than would the theory of
the primacy of the international legal order. The former does appear,
however, to supply a justification for a policy that rejects every signifi-
cant limitation of the state's freedom of action. The justification is
based on a fallacy involving, in a disastrous way, the ambiguity of the
concept of sovereignty—this time highest legal authority, another
time unrestricted freedom of action. Yet this fallacy is a hard and fast
component of the political ideology of imperialism, which is sustained
by the dogma of state sovereignty. The same thing is true, mutatis
mutandis, of the preference for the primacy of the international legal
order. This theory is no less propitious for the ideal of least restricted
sovereignty with respect to the state's freedom of action than is the
theory of the primacy of the individual domestic legal order, but the
former does appear to justify more easily a significant limitation of the
state's freedom of action. This is also a fallacy, but one that in fact
plays a decisive role in, the political ideology of pacifism.

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2. Max Planck, Vorträge und Erinnerungen (1949), p. 311. [The essay from
which Kelsen quotes, "On the Nature of Free Will" ("Vom Wesen der Wil-
lenfreiheit"), appeared in an English translation in Max Planck, The Universe in
the Light of Modern Physics (W.H. Johnston transl. 1937), at pp. 85-118; the quoted
lines are at pp. 106-07.]
By exposing these fallacies, by removing from both systems of reference the appearance of logical demonstration, which would be irrefutable as such, and by reducing both to political arguments, which can be met with political counterarguments, a genuine legal theory clears the way for both political developments alike, without postulating or justifying either. Legal theory *qua* theory is entirely indifferent to them both.