at gunpoint; there would not be enough soldiers and policemen to hold the guns (a sort of extreme Orwellian vision of society), they would have to sleep sooner or later, and then anarchy might break out.

... If law is not, by and large, a body of rules that are enforced at gunpoint, what is an individual rule of law? Is it, as the 19th century positivists maintained, a command of the state that is backed by the state's enforcement power? To be sure, some 'laws' might be just that: a dictator issues a command for his personal indulgence or whim, and if he has sufficiently satisfied his close advisors and the military in other areas, they will probably enforce his command. But most laws will not have this characteristic. Indeed, looking at the matter more microscopically, what is it that forces a judge to decide the case before her on the basis of precedent and statutes? Is another judge holding a gun to her head? Does she examine whether the law will be enforced to see whether it is law? How does she know, in advance of her own decision, what will be enforced?

This point came up in the famous case of *Marbury v Madison*,[43] famous to generations of American law students but often misinterpreted. In that case, Chief Justice Marshall's 'bottom line' was that the Supreme Court has no original jurisdiction to issue writs of *mandamus.* In short, there was no power to enforce that which the plaintiff demanded. If 'law' were coincident with enforceability, then, since under Marshall's reasoning there was not power of enforcement in the Supreme Court because it lacked jurisdiction, nothing Marshall said in his opinion would have had any legal significance. To put it another way, lacking a 'remedy', the plaintiff would have no 'right', not even a right to get a decision from the Court on the question of 'right'.

But Marshall took an entirely different tack. He began with the question: does the plaintiff have a right? He then asked the second question: if the plaintiff has a right, does he have a remedy? And his third question was, if the plaintiff has a remedy, can the relief issue form this Court? By putting the questions in this order, Marshall did the opposite of what the positivists would require. By dealing first with the question of 'right', Marshall was able to address that question wholly apart from whether there was a remedy or whether the remedy was available from the Supreme Court. As all law students know, Marshall answered his own question that there was indeed a right, and secondly, there being a right meant that the plaintiff had a remedy. By going through this reasoning, Marshall was able to establish the groundwork for his path-breaking assertion of judicial review of questions of constitutionality. He held that, in the face of a right and remedy, the congressional statute purporting to grant that remedy to the Supreme Court as a matter of original jurisdiction violated the Constitution. Marshall would not have been able to make his assertion of judicial review if he had begun and ended his opinion with the simple sentence, 'we have no jurisdiction; case dismissed'. Hence, we see that in a case where by the Court's own admission it lacked jurisdiction and the power of enforcement, nevertheless the Court was able to establish a point of fundamental substantive significance.

Marshall's persuasiveness was dependent upon a consensus at the time he wrote his opinion that there could be such a thing as a 'right' without a legal remedy. This was part of a larger conviction in those days that the 'law' itself was not something that only works when a policeman is standing by ready to enforce it physically. Law indeed is something that is opposed to force. Right is not the

43 5 US (1 Cranch) 137 (1803).

same thing as might. In Continental countries, the word for 'law' is, as translated, the word 'right'. In law, there is a fundamental element of right, of justice, dating back to Cicero's and St Thomas' equation of 'right reason' with the natural law (the latter being those reasonable rules that accommodate the peaceful affairs of persons in a society).

Under this argument that we are developing, the relation of force to law, of might to right, is a contingent and not a necessary relation. We can imagine a society under law where there is no force. People obey the laws, and no one disobeys. There is no need, in this idyllic utopia, for enforcement, because there is universal willing compliance. Surely we cannot claim that such a society does not have 'law'. It is clear that the society is one that is under law, and that the contingent use of force is simply not necessary. To take an example closer to home, suppose that in some state of the Union there has not been a kidnapping since that state entered the Union. Would we say that the law against kidnapping in that state is not a law? Certainly no one would argue that if a law is so successful that it never needs enforcement, it is not a law. Thus, we can conclude from this hypothetical that enforcement is not intrinsic to, is not necessary to, the idea of law.

But you might object that enforcement must potentially be present, even if it is not invoked. In other words, in the state that has no kidnapping, it is nevertheless true that if someone commits this crime – or even contemplates committing it – the potential for enforcement is ever-present. It is this potential for enforcement, after all, that the positivists insist upon when they draw our attention to the necessary connection between a rule of law and its enforcement.

To take care of this objection, we may simply modify our previous hypothetical of the idyllic utopia. Assume not only that they have never had a need to enforce their laws, but also that they have no enforcement machinery – no police, no jails, no sheriffs, no marshals. They can still have a system of laws, as complex as you please, even without the potential for enforcement.

You might now object that we cannot prove something about the nature of law, an all-too-human institution, by postulating the existence of a utopia where the inhabitants never break the law. Can we modify our utopia to make it seem more realistic? Suppose occasionally someone breaks the law, but is ostracised from society. Suppose one who breaches a contract is considered a moral renegade who should not be entrusted with any further business dealings. These expressions of sharp social disapproval, and occasionally of ostracism, may work to discourage the few people who would disobey the law. They may not always work, but they may be potent enough to deter most of the people (a minority to begin with) who might consider breaking the law. Thus, our non-perfect utopia now consists of a regime where almost all of the laws are obeyed almost all of the time, where occasional disobedience is met with sharp social disapproval, and where occasionally, despite the 'mechanism' of social disapproval, occasional violations of the law occur. Is this not, nevertheless, a legal system?

A positivist might happen to object to this concept as follows: the idea of social disapproval, and sometimes social ostracism, is the same thing as a sanction. It constitutes a way of enforcing the law. Hence, by introducing this social-disapproval factor into this utopia, we have simply underscored the original point – that law (except in idyllic utopias which do not exist) depends upon potential enforcement.

But if that is the positivist's position, then the international lawyer should gladly concede the point. For international law recognises that the social-disapproval

factor operates as a sanction. A nation among the community of nations which violates the law, for example, by disregarding a treaty obligation, would certainly be subject to social disapproval by the other nations. in this sense, international law is really 'law'.

Now it is perhaps the positivist's turn to beat a hasty retreat. The positivist may now want to retract the equation of social disapproval with 'sanction', for fear of including international law under the term 'law'. Instead, the positivist will retreat to the original position that physical or even violent enforcement is necessary to make law 'law', and hence international law is not 'law'. We may, however, suspect that the positivist is reshaping definitions in order to exclude the international case, rather than to arrive at a general definition of law. Consistent with this position, the positivist will have to argue that any legal system in which social disapproval functions as the sole sanction (for example, in a peaceful tribal society) does not have 'law'. 'Law' is present only when, in addition to social disapproval, there is physical coercion stemming from the sovereign power of the state. But what if there is no need for physical coercion? The positivist must then conclude that there is no law.

Such a position would be difficult to defend, for if there is a society where people are so law-abiding that they get along only with the social-disapproval sanction, that society manifests a rather good case of 'law'. It is strange to insist that, for there to be law, physical coercion must also be used even if there is no need for it.

Yet even the serious student of law may not be satisfied with the preceding argument in its entirety. We want to ask what happens if the need for physical coercion should arise. In the international system, at least, we have states which occasionally break the rules of international law and which seem not to be deterred by expressions of social disapproval from other states. This is a reality of international life. Therefore, unlike the tribal society where social disapproval may constitute an effective sanction, international society needs a physical sanction to underscore its rules, otherwise, the rules will occasionally be flouted. Perhaps they will be ignored most often when the 'chips are down', which is exactly when they most need to be enforced. How can we call such a system, dependent for its support on so feeble a mechanism as social approval, a 'legal' system?

It is hard to discern the logic behind the preceding objection, even while it is easy to understand it. We all recognise, and regret, that rules of international law are flouted on occasion, and we are all too aware of the fact that an outraged world public opinion simply is incapable of discouraging the violation. Should our conclusion then be that the rules of international law are not 'law' as we know the term, because as we know the term the 'law' involves the concept of physical enforcement? Yet, even in asking this, we acknowledge that physical enforcement is not a necessary characteristic of law (our 'utopian' examples). And we also acknowledge that, even in domestic cases, where the state is one of the parties, we cannot meaningfully speak of physical enforcement (Professor Fisher's argument). These two arguments destroy most of the logical force of our position that international law is not really law, and yet, we may cling to that position.

Some early writers on the law of nations attempted to meet the enforcement objection head-on, by asserting that rules of international law are indeed enforced by the mechanism of war. A nation that violates the rules will be the object of a 'just war' initiated precisely to punish the transgressing nation and to enforce the validity of the rules. This argument today sounds like an archaic ploy, for we know enough about wars to have learnt that the 'transgressing' state

> may occasionally win if it has the physical power to do so. Physical might bears no necessary connection to international right. Interestingly, the concept of a 'just war' has become, if possible, even more archaic under the collective security mechanisms of the League of Nations and its successor the United Nations. These bodies, in principle at least, are designed to stamp out acts of aggression wherever they occur. In other words, they are not set up for the purpose of enforcing international law, but simply for the purpose of enforcing international peace. It follows that if the peace is unjust, it will be enforced anyway. The United Nations seems to call for a 'cease fire' in disregard of the merits of the local conflict, and it appears to be concerned less with enforcing international law than with enforcing a prohibition against the use of force no matter what the justification.
>
> Yet there is something in the notion of a 'just war' that may help us to fashion a more compelling case for the proposition that international law is really 'law' than the other arguments we have examined ... what I will label as reciprocal-entitlement violation is a mechanism akin to the old 'just war' notion that underlies a realistic enforcement mechanism for international law.[44]

Some writers argue that much of the scepticism about international law could be equally applied to municipal law:

> ... the problem of the ultimate foundation of the binding character of law is in no way peculiar to international law.. It is a general legal problem, and arises just as much with regard to national law as it does for international law. No better illustration of this could be given than the one which is to be found in Salmond's *Jurisprudence*. A man is told he cannot ride his bicycle along a certain footpath. he asks why, and is told because it is forbidden by a certain by-law. He asks what is the authority for the by-law, and is told that it is made under an Act of Parliament. But if he asks what is the authority for the Act of Parliament, and what is the source of the rule that Acts of Parliament have the force of law, there is, and can be, no final answer. As Salmond says, no statute can confer this authority on Parliament, for that would be to assume the power that has to be accounted for. Whence would the statute itself derive its validity? No doubt the legal force of Acts of Parliament derives from the Constitution, written or unwritten. But then it must be asked what it is that gives the Constitution legal force? In some countries the Constitution itself has been enacted: but what gave that enactment validity? If those who enacted it had the legal, as distinct merely from the physical, power to do so, whence did they derive it, what is the rule of law that conferred the power on them, and whence did it derive its validity? And so on. Ultimately there can be no answer, or there can only be a series of answers, no one of which can be absolutely final.
>
> The reason why the difficulty is less obtrusive in the national than in the international field, is that in the national field the interim terms in the series afford a sufficiently satisfying practical basis for the obligatory force of the law to make the average person feel it unnecessary to go further – for instance, it is usually enough that the law has been enacted by the proper method, without enquiring what it is that confers legal force on enactment by that particular method. In the international field, however, there are no interim terms of quite the same kind. The absence of any patent and obvious source of obligation, such as might exist if there were an international legislature, deprives the international

44 Anthony D'Amato, 'Is International Law Really "Law"?' (1985) 79 *Northwestern University Law Review* at p 1300.

jurist of any manifest point at which he can rest, and which he can regard as a satisfactory terminal point beyond which there is no practical necessity to go.

In such a position as this, the international lawyer might well take a leaf out of the mathematician's book when the latter is faced with an infinite regress. One mathematical pronouncement on the subject[45] is to this effect: that when the object of any search begins to recede in the repetitive fashion of a regress:

> ... you may rest assured that you are battering against a boundary of *possible* human knowledge – *a boundary which manifests itself in that form*.

The mathematician knows that, if this is the position, no useful purpose will be served, nor will any additional knowledge be gained, by going beyond the first and second, or, at most, the third term of the series; for with the third term, the regress is invariably entered. The international lawyer would be justified in adopting the same view. For those who favour the *consent* theory, for instance, there would be little practical object in going beyond the proposition that there is an overriding principle of customary international law, not itself deriving from consent, but having the consequence that the general consent of states to a rule, once given or shown to exist, makes that rule binding on each state, irrespective of its subsequent wishes. For those who see law in the hallmark of society – the maxim *ubi societas ibi jus* – and who consequently postulate the necessity for the existence of law in any society, there would be no need to go beyond a proposition to the effect that if law is a necessity of the international (or any other) order, this implies that the law must be binding, or it cannot serve its purpose. If law is *necessary*, that necessity must lie precisely in the need for obligatory rules as between members of a society, and it would involve an inherent contradiction to propound law as necessary, if it was not also necessarily binding. This way of putting the matter has considerable attractions.[46]

The international community, as a society whose members – or at least whose 'basic members' – are sovereign states, cannot possess a *corpus* of law similar to that of domestic law. The latter is created and imposed on the members of each national society by an authority which is juridically superior to them; in other words, the structure of the domestic legal systems is institutionalised and the law – or at least a major part of it – is derived from institutional machinery. In the international society, on the other hand, the states, precisely because they are sovereign, are not subject to a hierarchical authority regarded as juridically imposed upon them as superior. The international community is therefore a non-institutionalised society, that is to say endowed with only those institutions – the international organisations – which the 'basic members' have been pleased to create by agreement among themselves, institutions which they can, if they so desire, liquidate. International law, therefore, can only be composed – at bottom – of rules which the sovereign states themselves establish in order to regulate the relations between them.'[47]

Other writers accept the nature of international law as law and cast doubt on the positivist use of municipal law as a model for law in general. Such writers

45 JW Dunne, *Nothing Dies*, 1946, London: Faber & Faber at p 32.

46 GG Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 *MLR* 1 at pp 9–11.

47 Luigi Condorelli (Professor of International Law at the University of Geneva), in *International Law: Achievements and Prospects*, 1991, Bedjaoui (ed) London: Martinus Nijhoff and UNESCO, at p 179.

argue that municipal law governs legal persons within a state, and such law is derived from a legal superior. International law operates on a different plane.

> International law is a law of co-ordination, not, as is the case of most internal law, a law of sub-ordination. By law of co-ordination we mean to say that it is created and applied by its own subjects, primarily the independent states (directly or indirectly), for their own common purposes.[48]
>
> The young reader embarking on the study of international law is aware that 'law' is a body of rules which a human community, a society or an entity sets up in order to govern respective relationships at a given time. Such a reader knows that, over the long term, the content of such law varies, particularly in terms of the type of regulation exercised over the relationships considered (law of subordination or equality, of constraint or freedom, such as feudal law, capitalist or liberal law, socialist law, colonial law, and so forth) or, of course, in terms of the subject areas and sectors of life to be regulated (civil, penal, commercial, aerial, medical law, and so forth), or again in terms of the countries or areas of civilisation (Roman law, Anglo-Saxon law, Islamic law, Chinese law, and so on). What informs the inquiry of the student as he sets out on what for him are the fresh fields of international law is therefore less the concept of 'law', on which he has already acquired some ideas, than the fact – which calls for some explanation – that it is termed 'international'.
>
> Just as what is known as 'municipal' law is the set of rules governing the relationships of individuals, juridical persons, groups and entities among themselves within a given state, the law known as 'international' consists of a body of norms, in written form or otherwise, intended to discipline the relationships of states among themselves. Thus, in principle, it regulates the conduct of states and not that of individuals. states are still almost the only protagonists on the international stage. To be more precise, we should be speaking here of international 'public' law but the shorter expression is preferred in ordinary speech and we shall maintain its use here. The fundamental characteristic of this international law is thus that its function is to regulate the relations between states, in other words between entities known to be sovereign and which, in principle, assert their full independence of any legal order. This at once raises the problem (which lends international law its specificity and colour) of how these states which affirm their sovereignty can be subject to international law. If one postulates at the outset that there is no higher authority than the state, how can the norm of international law be produced for and applied by such a sovereign state? As might be expected, there is only one possible answer to this question, namely that, historically, it has not been possible for international law to be anything other than a law resting largely on the consent, whether express or tacit, of states and that this situation is bound to continue for a long time to come. This determines the true nature and real tonality of international law. It is more a law of co-ordination (between the sovereign jurisdictions of individual states) than a law of subordination such as municipal law, which regulates its subjects, where necessary through coercion exercised by the state apparatus.'[49]

The implication here is that international law and municipal law are two different species of law. This issue will be further referred to in the context of the monist-dualist debate discussed in Chapter 2. It should be noted here,

48 Rosenne, *Practice and Methods of International Law*, 1984, Dobbsferry, New York: Oceana at p 2.

49 Mohammed Bedjaoui (Judge of the International Court of Justice), *International Law: Achievements and Prospects*, 1991, London: Martinus Nijhoff and UNESCO at p 2.

however, that not all municipal law can be considered to be a 'law of subordination', derived from a legal superior. One only has to consider the development of public law in Britain to see an area of municipal law which is created and applied by its own subjects. Many of the rules of public law place restraints on government action although it is the government, as majority party in the House of Commons, that arguably has the power to make the law as it chooses.

Other writers have countered arguments about the validity of international law by pointing to the behaviour of states. For example, Brierly has written:

> The best evidence for the existence of international law is that every actual state recognises that it does exist and that it is itself under obligation to observe it. states may often violate international law, just as individuals often violate municipal law, but no more than individuals do states defend their violations by claiming that they are above the law.[50]

The fact is that states, the principal subjects of international law, do recognise a system of legal rules which they refer to as international law. Louis Henkin summed up the position:

> … almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.[51]

> … the reality of international law, that is to say, the actual use of rules described as rules of international law by governments, is not to be questioned. All normal governments employ experts to provide routine and other advice on matters of international law and constantly define their relations with other states in terms of international law. Governments and their officials routinely use rules which they have for a very long time called the 'law of nations' or ' international law'. It is not the case that resort to law is propagandist – though it sometimes is. The evidence is that reference to international law has been a part of the normal process of decision-making.[52]

When Iraq invaded Kuwait in August 1990, Saddam Hussein did not argue that there was no system of law preventing Iraq acting in the way it did. Rather he sought to justify military action on the basis of compliance with the rules of international law. Of course, the fact that states refer to and justify their actions in the language of international law is not conclusive proof that it exists. It may be argued that states behave according to pure self-interest and only refer to international law for purposes of legitimisation. Schwarzenberger has written that the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power, and to give this overriding system the respectability and sanctity law confers. But this is not to deny international law's status of law. It can and has been argued that municipal law exists to maintain the position of the ruling class. The actions of states cannot always be explained in terms of immediate self-interest. Even when extreme pragmatism governs state action and the result is the use of armed force, ultimately it is the rules of international law that are used to make the peace.

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50 Brierly, *The Outlook for International Law*, 1944, Oxford: Oxford University Press at p 5.

51 Henkin, *How Nations Behave*, 2nd edn, 1979, New York: Columbia University Press at p 47.

52 Brownlie, 'The Reality and Efficacy of International Law' (1981) LII *BYIL* 1.

International law receives a bad press because it is the breakdowns that make the news – but just because a law is broken does not mean that it does not exist.

1.4 The enforcement of international law

International law is not imposed on states in the sense that there is no international legislature. As has been seen, the traditional Western view is that international law is founded essentially on consensus. As will be seen in Chapter 3, it has traditionally been created in two ways: by the practice of states (custom) and through agreements entered into by states (treaties). Once international rules are established they have an imperative character and cannot be unilaterally modified at will by states. Unlike municipal law, however, there is no uniform enforcement machinery. The full details of the various ways in which states are made to conform to their international obligations will be discussed throughout the book. The aim here is simply to introduce the range of mechanisms available.

1.4.1 The United Nations

Under Chapter VII of the Charter of the United Nations, the UN Security Council may take enforcement measures where it has determined the existence of a threat to the peace, breach of the peace, or act of aggression. This topic will be dealt with in more detail in Chapter 13. Suffice it to say at this stage that the measures available to the Security Council range from the use of economic sanctions, as in the case of the severance of air links with Libya as a result of the Lockerbie bombing in 1992, to the use of armed force in the case of Iraq. The Security Council's main role is in maintaining international peace and security rather than in enforcing international law, but the two functions will often overlap.

1.4.2 Judicial enforcement

Reference has already been made to judgments of the International Court of Justice, which is the judicial organ of the United Nations. Its main role is to resolve legal disputes between states and its judgments are binding on the parties to the dispute. In addition to the ICJ there are a number of specialised international tribunals dealing with particular areas of the law and it is not uncommon for states to establish *ad hoc* tribunals to resolve differences. The whole issue of the peaceful settlement of disputes will be dealt with in more detail in Chapter 12.

1.4.3 Loss of legal rights and privileges

A common enforcement method used by states is the withdrawal of legal rights and privileges. The best known example is the severing of diplomatic relations, but sanctions falling short of this may include trade embargoes, the freezing of assets, and suspension of treaty rights. The adoption of such measures, and indeed the mere threat of them, can very often prove effective in enforcing international obligations.

1.4.4 Self-help

In very limited situations, international law does countenance self-help in the sense of use of armed force. It is a fundamental rule of international law that the first use of armed force is prohibited but a right of self defence does exist and again the actual use or threat of action in self defence may be effective in enforcing international obligations. The law relating to the use of force, including the right of self defence, is discussed in Chapter 13.

Two further points can be made about enforcement. First, an important aspect of law is its role in helping to predict future action. The action of individuals and states is generally predicated on a presumption that the law will be observed. Although the existing laws may be criticised and reforms demanded, it is in the general interest that law is upheld. An important factor influencing the observance of international law is therefore reciprocity. For example, it is in a state's own interests to respect the territorial sovereignty of other states as they will in turn respect *its* territorial sovereignty. Over 300 years ago Grotius could state:

> ... law is not founded on expediency alone. There is no state so powerful that it may not some time need the help of others outside itself, either for the purposes of trade or even to ward off the forces of may foreign nations untied against it ... All things are uncertain the moment men depart from law.

The final point involves public opinion. Allusion has already been made to the role of law in the legitimisation of action. states are ever keen to show that their actions are compatible with international law and fear criticism based on the fact that they are failing to observe its rules. One only has to look at the role played by organisations such as Amnesty International in publicising abuses of international human rights law to recognise the effect that informed public opinion can have on state practice. Of course, no system of law can prevent atrocities being carried out. Just as municipal criminal law does not necessarily prevent the occurrence of murder and rape, international law cannot necessarily prevent genocide. It is worth considering whether multiracial elections would have taken place in South Africa if there existed no system of international law. For, arguably, it was the international law prohibition of apartheid, and the United Nations sanctions that were imposed on South Africa for its breach of the prohibition, that led to the demise of the white minority regime. The issue of human rights and apartheid will be further considered in Chapter 15.

CHAPTER 2

THE RELATIONSHIP BETWEEN MUNICIPAL LAW AND INTERNATIONAL LAW

2.1 Introduction

International law is not confined to regulating the relations between states, and the scope of international law is no longer limited to the rules of warfare and the conduct of diplomatic relations. Matters of social concern such as health, education and economics fall within the ambit of international law and a growing body of rules sets down rights and duties for individuals. Even if it were still correct to speak in terms of international law being a system of rules governing the conduct of states, the fact remains that states are abstract entities which can only act through individuals. State actions are performed by individuals and it therefore follows that international rules have to be applied by individuals. Individual conduct within a state is the subject of municipal law and thus it can be seen that there is potential for the rules of international law to come into contact with rules of municipal law.

This chapter is concerned with the relationship that exists between international law and municipal law. That relationship gives rise to two main areas of discussion:

1 The theoretical question as to whether international law and municipal law are part of a universal legal order ('monism') or whether they form two distinct systems of law ('dualism');

2 The practical issue of what rules govern the situation where there appears to be a conflict between the rules of international law and the rules of municipal law: This may occur either:

   (a) before an international court; or

   (b) before a municipal court

2.2 The theoretical issue

Historically there have been two main schools of thought: monism and dualism. Their ideas are outlined here but it should be noted that many modern writers doubt the utility of the monism/dualism dichotomy. Furthermore, courts faced with practical problems involving potential conflicts between the rules of international law and municipal law rarely refer to the theoretical issues. It is, however, instructive when considering actual court decisions to question their theoretical underpinnings.

> The relationship between international law and municipal law has been the subject of much doctrinal dispute. At opposing extremes are the 'dualist' and 'monist' schools of thought. According to the former, international law and the internal law of states are totally separate legal systems. Being separate systems, international law would not as such form part of the internal law of a state: to the extent that in particular instances rules of international law may apply within a state they do so by virtue of their adoption by the internal law of the state, and apply as part of that internal law and not as international law. Such a view avoids any question of the supremacy of the one system of law over the other since they share no common field of application: and each is supreme in its own