



TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF
CUSTOMARY INTERNATIONAL LAW

Paper No. 012/2019

*Beyond Formalism: Reviving the Legacy
of Sir Henry Maine for CIL*

by Andreas Hadjigeorgiou



university of
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This project has received funding
from the European Research
Council (ERC) under the European
Union's Horizon 2020 Research
and Innovation Programme (Grant
Agreement No. 759728).



European Research Council
Established by the European Commission



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forthcoming in:

P Merkouris, J Kammerhoffer & N Arajärvi (eds), N Mileva (ass ed), *The Theory and Philosophy of Customary International Law and its Interpretation* (forthcoming 2020)

The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

Beyond Formalism: Reviving the legacy of Sir Henry Maine for CIL

Andreas Hadjigeorgiou¹

Abstract

Customary International Law (CIL) has been perhaps the most controversial and fiercely debated concept within the realm of jurisprudence. The critiques and concerns that surround the concept of CIL attack not merely its efficacy, but its bare ontology, by questioning its status as law properly so. Implicit within these attacks, though, lies a formalist assumption about the concept of law in general that acts as an overarching theme. That is, that the concept of law is always the product of *formal design* and/or *formal ascertainment*. This conception, then, as a definition of law, stigmatizes CIL as an oxymoron or a mere impossibility. Nevertheless, and most interestingly so, though, the concept of CIL still exists, persists, and begins to experience an invigorating relevance. This demands that the critiques and concerns, which surround its ontology, be revisited, and the present paper has a novel route to suggest.

While the concept of CIL has been inspected extensively from the perspective of domestic and international legal practitioners and theorists, it has rarely been examined from the perspective of a legal historian; a perspective that might reveal valuable insights. By reviving the works of Sir Henry Maine in the history of law, as well as the philosophical legacy which grew out of them, three claims shall be made. 1. CIL is law properly so. 2. Despite its primarily customary nature, the international legal order has been following the same line of development as domestic legal systems. 3. While the structure of international law is not on a par with the formalized structure of domestic legislative systems, it is far from the level of mere, or primitive, customary law. The overall conclusion will be that the ontological critiques and concerns that surround the concept of CIL are caused by a historically incorrect philosophical understanding of the genesis and development of law within its domestic environment.

1. Introduction

CIL has perhaps been the most controversial and fiercely debated legal concept within the realm of jurisprudence. Nevertheless, and most interestingly so, the concept of CIL still exists, persists, and begins to experience an invigorating relevance.² This has enabled a number of

¹ Andreas Hadjigeorgiou is a PhD candidate in Law at the University of Antwerp (Belgium) and the University of Groningen (Netherlands); a lawyer in training at the General Attorney's Office of the Republic of Cyprus; and the Director of Studies at the Cypriot Branch of the International Law Association.

Contact details: h.andrew@hotmail.co.uk and a.h.hadjigeorgiou@rug.nl

² For example, international human rights making claims to legality *as customary international law*, adds a new kind of relevance to this concept within the realm of international law. For a discussion on this, and the theoretical problems it poses, see Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A reconciliation', [2001] *The American Journal of International Law* vol.95 757. Another theorist that has raised this possibility from another perspective, see Hugh A.W. Thirlway, *International Customary Law and Codification* (A. W. Sijthof 1972)

theorists to easily dismiss the question of whether customary international law is really law as irrelevant, by taking its existence, legality, and status as law as an *a priori* assumption. Some, for example, have made the claim that we now live in a ‘post-ontological’ era:

‘...where the existence of a genuinely legal international order can be safely presumed, and theorists can focus instead on investigating whether international law is effective, enforceable, understood, or fair.’³

The same is echoed by Samantha Besson in the context of her own discussion:

“...the claim to and justification of the authority of international law has become a central concern for international legal scholars ever since the late 1980s. It was said to replace antecedent and more ontological discussions about the nature of international law; after those discussions had been dominating the theorising of international law since the 1950s.”⁴

Nonetheless, the major schools dominating jurisprudence domestically define and conceptualize law in a way which stigmatizes CIL as a mere case of non-law⁵ or, at best, a problematic or primitive instance.⁶ While this is an unsurprising result when it comes from the perspective of domestic practitioners and theorists, more recently concerns about the ontology of CIL have begun appearing from within international legal theory, from the perspective of international practitioners and theorists.⁷

Whether these critiques and concerns are targeting the legal status of international law *per se*,⁸ or merely a *part* of international law,⁹ they all seem to make certain implicit assumptions about the concept of law in general. That is, that law is always the product of *formal design*¹⁰ or *formal*

³ Carmen E. Pavel and David Lefkowitz, ‘Skeptical challenges to International Law’, *Philosophy Compass*, vol. 13, issue 8, 2018, p.2.

⁴ Samantha Besson, ‘The Authority of International Law—Lifting the State Veil’, [2008] *Sydney Law Review* vol.31 347

⁵ Austinian Positivism for example famously argued that the whole of international law is merely positive morality. The Realist school of thought, such as Oliver Wendell Holmes and Karl Llewellyn, agreed.

⁶ Hans Kelsen has famously defined international law as primitive law.

⁷ See Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2006); Anthony Carty, *The Decay of International Law* (Manchester University Press 1986); and Anthony Carty, ‘The need to be rid of the idea of general customary law’, *American Journal of International Law Unbound* vol.112 2018.

⁸ For example, while Austin’s scheme could accommodate for the concept of international treaties (through the consent of the sovereign), leaving his sole problem to be with custom and CIL, it seems that his attack is meant to disprove the legal status of international *per se*, since he ends up labelling international law as a whole as ‘positive morality’.

⁹ Prof. d’Aspremont’s later critique of the life-cycle of CIL, and the concept of a custom-making moment, seems to target CIL as a specific (sub)part of international law which stands as law prior to any formal ascertainment and/or interpretation, while he seems to take for granted the legal status of international law *per se*, by limiting the concept as such to other parts. His approach of dismissing the traditional ‘circle of life’ of CIL, by denying any prior to interpretation, formation and identification, seems to be essentially a Realist argument. See Jean d’Aspremont, ‘The decay of Modern Customary International Law in Spite of Scholarly Heroism’, in Giuliana Z. Capaldo, *The Global Yearbook of International Law and Jurisprudence 2015*, (Oxford University press 2016). The same can be said for Prof. Carty; while his work is titled *The decay of International Law* it seems to target CIL as such, and it seems to be taking for granted the legal status of other parts of international law (such as treaties, conventions, judicial judgments etc), this can also be seen from the title of his article (The need to be rid of the concept of CIL) which clarifies that the attack is not on international law *per se*, but on CIL as a specific (sub)part of international law.

¹⁰ Austin for example, claimed that law is the product of the Sovereign’s formal design, shaped out of legislation enforced as commands, and always based upon his own wishes and whims.

ascertainment.¹¹ This assumption then, taken and presented as a *definition* of law unavoidably creates concerns about the ontology of CIL and denounces its concept as irregular, primitive or simply an impossibility – an oxymoron.

International law is then asked to create or restructure itself in a way which is closer to the formalism of domestic legal systems; by shedding its customary part(s) and by basing itself upon more formal materials – such as treaties, codifications, declarations, judicial judgments etc. In other words, there is an inclination towards *formalism*.

For the purposes of this paper, formalism is defined as the trend of treating formal sources and documents as ‘better’ tools for both a) the preservation of existing rules of CIL,¹² and b) the ‘creation’ of new legal rules. While some formalisation is, undeniably, helpful and even necessary, we should be more critical of this paradigm, set by the current structure of domestic legal systems. Despite the centrality it has received within domestic jurisprudence and philosophy, we should scrutinize this formalism more extensively before cherishing it as an ideal.

From this perspective, the present paper suggests that we begin with a historical enquiry into the growth and development of law, and this formalism, within its domestic environment. The proposition posed is that if we diverge our attention away from how domestic legal systems are currently structured, and unto how law begun domestically and only gradually developed to take on the formalised structure we currently experience, then CIL (and IL in general) might not seem such a peculiar or questionable instance.

To this end, by reviving the comparative studies of Sir Henry Maine in the history of law, as well as the philosophical legacy which grew out of them, three core claims shall be made. First, CIL is law properly so, and its legality is neither new nor recent. Second, despite its primarily customary nature, international law has been following the same ‘normal’ line of development that law trailed domestically. Third, even though the structure of international law has not developed into the current formalised legislative structure of domestic systems it is far from any initial or ‘primitive’ stage.

Furthermore, Maine and his legacy challenge us to question the formalization (or formal ascertainment) and legislation (or formal design) so prominently exhibited by domestic legal systems, and idolized by jurisprudence in general, by revealing some of the unforeseen consequences that historically followed these developments. The formalism inspired and idolized by domestic legal practice might not be the only way, nor the best way; and we should not be so fast in shedding, or tampering with, international law’s customary nature.

¹¹ Ascertainment holds true whether it is a product of judicial judgment or codification. The Realists for example, claimed that while law is a product of the formal ascertainment of merely customary rules to situations by judges. Of course, it should be mentioned, that most of the Realist schemes still cannot account for international law even as something anterior to the judgments of international courts.

¹² The Vienna Convention, the Hague Conventions of 1899 and 1907, as well as the Geneva Conventions, are good examples.

In this way, Maine's works, as well as the legacy that spawned and evolved out of them, can help a) rehabilitate the concept of CIL within dominant understanding (domestic or otherwise), and b) reveal more complex ways and possibilities of how to evolve, supplement and utilize meaningfully custom within international legal practice. The overarching conclusion will be that the ontological critiques and concerns that surround CIL stem from a historically incorrect philosophical understanding of the genesis and growth of law within its domestic environment.

Consequently, while Maine's works and efforts were not aimed at international law per se, this is the area where Maine's legacy can make its biggest contribution today. Maine himself began focusing on international law towards the end of his life (with a posthumous book-publication), but these efforts were cut short by his sudden death. The present paper, then, is one of the first in a collection of papers attempting to revive this legacy, with a keen eye fixed on the concept of CIL.

2. The Curious Case of Sir Henry Maine

The case of Sir Henry Maine is a curious one. While today he is virtually unknown, he was a very famous scholar during his time (1822-1888). While he has a long list of achievements, the one he should have been immortalized most for is his position as the Chair of Jurisprudence in Oxford¹³ (a Chair later held by Hart and Dworkin). The Chair was in reality established particularly *for* Maine, as an effort by Oxford to accommodate Maine's 'peculiar genius'.¹⁴

While Jurisprudence has always been a discipline built upon the intersection of Law and Philosophy; Maine gave it a curious spin. His work in legal history attacked all the philosophical approaches to law of his time. His claim was that they were all designed to explain domestic legal systems as we experience them in isolation at only one given point in time (the famous Sovereign structures), paying no regard to what law has been in the past, nor to how it evolved slowly to take on the formalised structure we experience today. Instead he proposed to investigate legal history; and this legal history was always meant to lay the foundation for a rejuvenated philosophical scheme.

Hence, Maine's work is not a philosophy of law, but rather blueprints for redefining the way philosophy is employed in jurisprudential enquiries by firmly relating it to law's history and its social, empirical dimensions. Maine's history should, then, be seen as groundwork(s); paving the way for a different kind of philosophical enquiry, something we today coin as *interdisciplinary*. Within these historical groundworks, though, we can find powerful observations that lay out a

¹³ As the website of the University of Oxford itself testifies: '[Although] today's worldwide association of Oxford jurisprudence with a philosophical approach to law stems mainly from the appointment of HLA Hart to the chair in 1952 [...] The Professorship of Jurisprudence was established in 1869 to attract to Oxford Sir Henry Maine, already famous for his Ancient Law and his work in India' - See <http://www2.law.ox.ac.uk/jurisprudence/history.htm> [last accessed on 22 March 2019]

¹⁴ This is a phrase used by his successor Frederik Pollock, in his inaugural lecture in Oxford, that was devoted to Maine.

philosophical perspective, and a way of thinking about law, that can prove to be invaluable for the philosophy of CIL.

The current examination shall focus on drafting two grand themes out of Maine's work, and relating those to CIL and the international legal order in general. First, law is not a static, externally imposed system composed of commands and threats; nor is law a 'new' or 'recent' phenomenon. Like living, breathing organisms, law itself has a history and a line of development; history speaks of law as an *evolutionary* phenomenon. Law exists, and has existed, in a myriad of forms – long before the arrival of any Sovereign, or the concept of Legislation.

As such, law is a phenomenon that grows customarily from the inside out and evolves alongside the society it stems out of. The changing structures of law reflect, then, the changing structures of society. Second, rather than being unconnected to custom, legal orders begin with *custom* and it is questionable whether they ever grow beyond it.¹⁵ The simplest truism lies in the fact that formal law is itself based upon pre-existing custom(s), which were accounted for as existing independently of the authority which proclaimed them.

Let us, then, investigate how Maine's narrative can be operationalised to better understand the status of CIL and its development into an international legal order. Section three will begin by drawing out the evolutionary narrative Maine drafted out of legal history and connecting it to the structure of CIL. Section four will use the agents of change Maine drafted out as accompanying elements within each evolutionary stage, to understand the development of CIL and the international legal order as a whole.

Section five will bring the preceding discussions together by drawing some general conclusions about the conceptualisation of CIL from the perspective advocated by Maine. Section six will briefly highlight how later developments within the philosophical legacy which grew out of Maine's works, interrelates and complements his perspective against formalism – further highlighting the value the revival of Maine's name and legacy can have for CIL.

3. Maine's Ancient Law¹⁶

'It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of.'¹⁷

¹⁵ Whether at a certain point of development law manages to fully detach from custom is a separate question, for another time. The relevant claim for the coming discussion is that whatever happens to the relation between custom and law, the phenomenon of law always begins with custom, and finds its roots there. See next section for a discussion on the matter.

¹⁶ This paper builds upon certain groundworks laid out in a previous paper, by furthering that discussion and relating it specifically to (customary) international law and the concept of formalism. Thus, in re-introducing Maine's work in the current section the present paper overlaps in content, and borrows certain phrases, from the previous work. See Andreas Hadjigeorgiou, 'The legacy of Sir Henry Maine in the 21st Century' Noesis Special Issue on the Philosophy of Customary Law 2020 (forthcoming – attached together with this paper).

¹⁷ Maine, H.S., *Ancient Law* (Cambridge University Press 1861) p.8 (hereinafter *Ancient Law*)

From the beginning of history men lived together in societies; and human societies, no matter how far back one goes, were always characterized by the presence of order and organization.¹⁸ Further, while archaic communities and ancient law know nothing of kings and legislators, out of sheer custom spawn norms, duties, order. In Homeric poems and the Icelandic Sagas, we even hear of the concept of right/justice being distinctly attached to the concept of customary law.¹⁹

Here is where it gets interesting though. During the centuries that preceded the constitution of Sovereign-Commanders, and all-mighty Legislators, individuals were not dispersed/unconnected, they were organized. However, they were not organized in societies/communities of *individuals* as we would expect; rather individuals were organized in institutions, the primary of which was the family. These family-institutions were equal units in terms of authority, and the only thing that stood above them were customs and customary law – the very same thing that constituted these units. Within the family-institution the ‘law’ was the word of the father, but as Maine wisely reminds us:

‘Society in primitive times was not what it is assumed to be at present, a collection of *individuals*. In fact, and in the view of the men who composed it, it was *an aggregation of families*. The contrast may be most forcibly expressed by saying that the *unit* of an ancient society was the Family, of a modern society the Individual. [...] Men are first seen distributed in perfectly insulated groups, held together by obedience to the parent. Law is the parent’s word, but it is not yet in the condition of those *themistes* [judgments of justice/customary law].’²⁰

Customary law is, then, law properly so because that is the part of the greater normative system which organizes individuals in the institutional units to which they belong; the units that they themselves, others, and society at large understands them through. From this perspective, the reason why the word of father (within each family-institution) is not yet on par with the legality of customary law, becomes apparent. It is customary law which dictates that all persons, in order to be recognized members of the community, must belong to a family unit. Further, not every family unit will do. It is, thus, customary law which dictates that all recognized units must be connected through common lineage.

It is also customary law which designates the word of the *father* as an authority within them. This becomes a truism once it is realized that in other societies custom(ary law) designates the word of the *mother*. As such, without assimilating seriously within our perspective customary law, we are unable to understand the society, which we deal with, in the same way that it makes sense of its own self and structure. This, of course, has its own conceptual connection to CIL and

¹⁸ Even if those varied from community to community, and from one century to the other.

¹⁹ As Frederick Pollock (Maine’s disciple and successor to the Oxford Chair of Jurisprudence) notes: ‘Maine’s reference to the Homeric poems as some of our best evidence for the archaic forms of legal ideas in Indo-European communities is a brilliant example of his insight. [...] They describe a society in which custom is understood if not always observed, positive duties are definable if not easily enforceable, and judgements are rendered with solemnity and regarded as binding, although we hear nothing of any standing authority such as could be called either legislative or executive in the modern sense’ – see Frederick Pollock, *Introduction and Notes to Sir Henry Maine’s ‘Ancient Law’*, John Murray, London, 1914, p.2-4

²⁰ Ancient Law, at p.126

the way it constitutes a society out of an aggregation of ‘state-institutions’ – within which the word of the ‘Sovereign’ is law. Maine was quite aware of this:

‘Ancient jurisprudence, if a perhaps deceptive comparison may be employed, may be likened to International Law, filling nothing, as it were, excepting the interstices between the great groups which are the atoms of society. In a community so situated, the legislation of assemblies and the jurisdiction of Courts reaches only to the heads of families, and to every other individual the rule of conduct is the law of his home, of which his Parent is the legislator.’²¹

From this philosophical perspective, it becomes obvious that the concept of Sovereignty cannot be used as the primary foundation for international law – nor law in general. That is so since the normative system which organizes (or recognizes the organization of) individuals in state-institutions, and constitutes/recognizes the Sovereign as the authoritative figure within each such institution, *is* CIL.²² Sovereignty itself is, from this perspective, constructed by custom/ary international law. Maine proposed this conceptualization as early as 1888, in his posthumous book on International Law:

‘What really enables states to exercise their Sovereignty in this way is nothing but the legal rule itself.’²³

And such a legal rule, can be nothing else but a rule of CIL. Maine’s point of view highlights the primacy we must grant international customary law over the units which are constituted, and regulated, by it. And this point of view is not unique to Maine, of course. Rather it is a perspective famously argued for about eight decades later by Hans Kelsen. It is also a perspective present in the works of H.L.A. Hart, Maine’s most famous successor to the Oxford Chair of Jurisprudence. In the last chapter of the *Concept of Law*, dedicated to international law, Hart writes:

‘For if in fact we find that there exists among states a given form of international authority, the sovereignty of states is to that extent limited, and it has just the extent which the rules allow. [...] Hence we can only know which states are sovereign, and what the extent of their sovereignty is, when we know what the rules are. [...] The question for municipal law is: what is the extent of the supreme legislative authority recognized in this system? For international law it is: what is the maximum area of autonomy which the rules allow to states? [...] [In this way,] there is no way of knowing what sovereignty states have, till we know what the forms of international law are and whether or not they are mere empty forms.

Thus, rather than a special, or a defective, case of law, customary (international) law reveals itself as the most fundamental and primary instance of law, even in its most primitive form. According to Maine, even the oligarchies and aristocracies, which came in power during the epoch of Customary Law recognized its primacy, since even they only claimed to have proper knowledge of customary law, but not be the authors or sources of it.

²¹ Ancient Law, p.167

²² Obviously, this conceptual structure bears close resemblance to what was later theorized by Kelsen.

²³ Maine, H.S., *International Law* (John Murray 1890), p.65

‘Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to. [...] The epoch of Customary Law, and of its custody by a privileged order, is a very remarkable one. [...] What the juristical oligarchy claims is to monopolise the *knowledge* of the laws.’²⁴

It is exactly because this customary organization was more complex than mere individuals could comprehend at that time, why oligarchies were vested with such power. As Maine notes, this power was surely abused, but it still did not amount to any tyranny or command-sovereignty in the Austinian sense. Nevertheless, it is exactly because individuals could not equally comprehend the customary organization to which they partook, and because the power vested in the oligarchies was abused, why (once writing was invented) societies wrote down, codified, and (thus) formalized, first and foremost, those customary rules which were law.

While this formalization was necessitated by the circumstances customary law was confronted with in its domestic environment, this had its own adverse effects:

‘When primitive law has once been embodied in a Code, there is an **end** to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without. It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long — in some instances the immense — interval between their declaration by a patriarchal monarch and their publication in writing. [...] It would be unsafe too to affirm that no part of the alteration was effected deliberately. But from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change.’²⁵

What Maine suggests is that insofar as law was primarily customary, it was implicitly changing alongside society and the changing needs of its environment; spontaneously developing *through practice* and always being ‘up-to-date’. The codification and formalization of law, insofar as it i) stopped custom from growing/evolving, ii) yielding new legal norms, and/or iii) taking away legality from outdated ones, it had the adverse effect of halting development and detaching law from the society which it stemmed out of.

Thus, while formalization furnishes an equally accessible knowledge of the law for everyone, altering that formal law to help it keep up with a continuously evolving society becomes a tremendous task; a task which proved fatal to most communities. Maine’s Ancient Law is, from this perspective, a work structured around the pitfalls of formalism and the effects it had on human societies. There he separates two kinds of societies; the static and the progressive ones. The static ones were those which did not manage to find ways to evolve their law alongside a consciously evolving society, while the progressive ones are those that did.

Maine interestingly notes that static societies were the rule in the history of law, while progressive ones the exception. By isolating and studying the progressive ones, Maine focused on understanding what he termed ‘agents of change’ - the tools and processes through which such

²⁴ Ancient Law, p.12

²⁵ Ibid, p.21

societies managed to continuously evolve their law to bring it in line with new social needs. This brings us to the part of Maine's theory which can have much value for conceptualizing the development of CIL.

4. Maine's Agents of Change

4.1. Legal Fictions

'A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, **Legal Fictions, Equity, and Legislation.** Their historical order is that in which I have placed them.'²⁶

Legislation, then, is the historically last agent to materialize. Whereas under the Austinian scheme legislation was the sole weapon through which both order and law were established; within Maine's scheme it has a much more modest position. Legislation is neither the constitutive force behind (social) order, nor behind law; custom fulfils those functions (at least for a very big portion of human history). Legislation is merely an agent of change; and the last one to be developed for that matter. As such, the rest of the paper will focus on the first two agents, as these are the ones that can prove to be of most value for CIL.

What is interesting is that, from this perspective, while the international legal order has not been equipped with the function of legislation, that does not necessarily reduce it to mere 'primitive law' if a) the other two agents have been saliently functioning within the international legal order and b) if the concept of legislation is not the all-mighty solution or unproblematic instrument jurisprudence has made it out to be. The present section will focus on the first argument, although we will have something to say about the second in the following section.

Maine's legal history testifies to the fact that not only was there law before legislation, nor any sovereign-commander, but there was also legal change. The major figures in this process were the courts. Courts were a much more significant agent in both the formal declaration, administration, and change of law than Austin's scheme could accommodate. As Pollock (Maine's disciple in Oxford) reminds us:

'[In] communities like those of the Homeric age, or of Iceland as described in the Sagas, there is **no sovereign** (in Hobbes's sense) to be found, **nor any legislative command, nor any definite sanction;** and yet in Iceland there were **regularly constituted courts** with a regular and even technical procedure, as the Njals Saga tells us at large.'²⁷

These Courts though did not employ commands nor any centralised coercion/sanction to enforce their rulings. Rather their authority depended on continuous acceptance and, while this was not always constant nor without its obstacles, they managed to sustain, not only order but,

²⁶ Ancient Law, at p.25

²⁷ Pollock, F., *Introduction and Notes* by Pollock, to *Sir Henry Maine's 'Ancient Law'* (John Murray 1914), at p.3

legal change; and, for the progressive societies, they managed to do so all the way until Sovereign-Kings appeared approximately around the late 15th/early 16th century. Further, these Courts were only tasked with authority (at least on the surface) to ‘declare’/identify the law - which, according to the beliefs of that time, existed ‘immemorially’ within custom.

‘On the surface’ because, implicitly, they did much more than that – and this brings us to their function, and ability, to covertly change and ‘update’ (customary) law, by employing the process, or agent, Maine calls ‘Legal Fictions’. This process refers to the function of the courts to extend, refine, and (on many occasions) change the content of legal rules, while ‘pretending’ that they were merely ‘interpreting’ and ‘applying’ already existing law. Maine describes this process with the following words:

‘I employ the expression "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. [...] The *fact* is in both cases that the law has been wholly changed; the *fiction* is that it remains what it always was. [...] The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. [...] They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present.’²⁸

Thus, ‘legal fiction’ refers to what we might call radical reinterpretation, or more recently as evolutive interpretation.²⁹ The end-result of this process is a rule which is formally the same, but functionally redefined – in essence, though, it is a different rule. While Legal Fictions were not employed solely or exclusively by Courts, they were the primary users.

Maine has an ingenious example to illustrate this process; what he terms the ‘Legal Fiction of Adoption’. As was already mentioned, ancient society was customarily composed of family-institutions, and it was a customary legal rule that these ‘families’ be connected via kinship. At a certain point, though, this rule was functionally redefined through a process of legal fiction.

At the end of this process, the new rule, while still formally requiring the same (that each family be connected via kinship), allowed this relation to be established not only through blood, but also through *adoption*. Admittedly, in essence it is a different rule, and while formally it looks the unchanged, in function it allows society, and the legal order as such, to operate on a different basis and adjust differently to its environment.

Thus, unlike Bentham, who truly ridiculed and despised the concept of legal fictions as it adulterated his perfectionist vision of the rule of law, Maine portrays them as something integral and invaluable for the evolution of both society and law:

²⁸ Maine, *Ancient Law*, at p.26-27

²⁹ See, for example, ch.4 and 5 in Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill Nijhoff 2019); and Christian Djeffal, ‘Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts?’, in (ed.) Helmut Philipp Aust and Georg Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016)

‘At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps towards civilisation. [...] We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law.’³⁰

From this perspective, Courts not only identify and ascertain already existing customary law, but they also refine, adjust and even flat out change ‘the law’ while only tasked with merely identifying/declaring and interpreting it. No matter how (un)comfortable we might feel with such a process – it is a reality and, according to Maine, one without which society, and law, would not have been able to survive the effects of formalism. Taken to CIL, we see the same process happening and consciously being realized. By taking, though, Maine’s perspective, we come to understand it. As Baker notes, in connection to this:

‘The problem which arises however is that while neither the ICTY nor ICJR is tasked with ‘making’ international law, but rather simply applying it, it is inevitable (as legal institutions tasked with the implementation of, at times, ambiguous and general legal rules) that their jurisprudence will, at times, fundamentally reshape the law that they are being asked to apply. [...] [N]ew law often arises, not from lawmaking bodies, but rather from citations of practice where often general and ambiguous rules and statutes are interpreted and put into action.’³¹

While this process of legal fictions, undeniably, causes its own problems,³² the existence of this process is *not* itself a problem. On the contrary, Maine teaches us that this process is not only a *normal* development (in the evolution of society and law), but necessary and invaluable. Further, from a Mainian perspective, it is a sign of progress and development. As such, it should not be feared nor obstructed; but it should be properly conceptualized and better regulated. This, though, requires properly understanding this process as an integral part in the development of law in general, and this is where Maine’s legacy becomes invaluable for CIL.

After all, from Maine’s philosophical perspective, legality as such is not the highest ideal which the concept of law is oriented towards, and neither is the rule of law. Rather law is oriented towards order and the survival of the community as such; and the same applies for the agents that speak on its behalf. While the ideal of formalism, that is that legal agents ought to always act exclusively upon formally designed and/or formally ascertained rules, was employed as means by which to safeguard law and its operation; its adverse effects proved fatal for the largest proportion of human societies, what Maine calls the ‘static’ ones. That is those communities which cherished law’s formal expression to the extent that they placed law’s development in a straitjacket where it could no longer truly serve society’s needs.

³⁰ Ibid

³¹ Baker, B., *Customary International Law in the 21st century: Old challenges and new debates*, [2010] The European Journal of International Law vol.21:1 185 (hereinafter Baker)

³² Ibid, at p.186

Maine's cautionary tale revolves around the fact that those social needs that underpin law, and which law is always oriented towards, always run ahead of law and its formal expression always 'lags behind'. A textual reading of the letter of formally designed and/or ascertained law runs out without illuminating a particular solution towards matters which are of urgent concern; and thus law cannot fulfil its purpose of establishing social order and ensuring survival. Those societies that cherished too much this formalism, perished.

The progressive ones, though, survived first and foremost by altering their law through practice. Legal fictions, then, refers not only to the process of extending old rules to new situations, thus altering their function, but also to the process of radically reinterpreting and even to the creation of law out of non-legal materials. To the extent that the result gets accepted by the legal subjects and restores order, ensuring survival, its value cannot be diminished by merely pointing to the fact that it was not formally ascertained in advance.

The Realist thought was definitively shaped by the realization of this process and while they overemphasized on it as the essence of law, they came to bring out this aspect of law's nature, to adapt to new circumstances by settling new claims and restoring order, in its best light. Karl Llewellyn, for example, together with anthropologist Adam Hoebel, wrote a few years later:

'The law-jobs are in their bare bones fundamental; they are eternal. Perhaps you can sum them all up in a single formulation: The law-jobs entail such arrangement and adjustment of people's behavior that the society (or the group) remains a society (or a group) and gets enough energy unleashed and coordinated to keep on functioning as a society (or as a group). [...] What is being said is that to *stay* a group, you must manage to deal with centrifugal tendencies when they break out, and that you must preventively manage to keep them from breaking out. And that you must *effect* organization, and that you must *keep* it effective. [...]

Thus each law-job, and all of them together, presents first of all an aspect of pure survival, a bare bones. The job must get done *enough* to keep the group going. This is brute struggle for continued existence.'

³³

From this perspective, wherever the legal subjects fail to solve a problem with a formally designed and/or ascertained rule, and a specific 'trouble-case' threatens stability and the survival of the community, courts have an obligation to go beyond formal law and to repair this breakage and restore order. This obligation is oriented after all not towards legality or the rule of law as such, but towards order and survival of the community as a whole. The same can be said for the formally ascertained and/or designed rules of international law.

If for example courts could not define, nor define, the concept of 'sanitary facilities',³⁴ by reading into the formal expression of the rule the concepts of 'soap' and 'clean', then how could such formal rules fulfil the purposes they were made out to fulfil – i.e. regulate society? While in this process courts are inevitably altering and extending the formal expression of rules, Maine teaches us that, even though it could and it might be abused, it performs an invaluable function within the international community; a function that the community could perish without.

From this perspective, when trying to conceptualize both the function of courts and the development of law as such, we should not grant an unquestionable primacy to this formalism. Rather, Maine reminds us, that the functions of this formalism should be understood, and

³³ Llewellyn and Hoebel, *The Cheyenne Way*, at p.290-2

³⁴ A similar scenario played out in the United States Court of Appeals case *Flores v. Barr*

counterbalanced, against the need for adaptability to new and changing circumstances. As such, international courts are not exceeding their function when they go beyond formally ascertained and/or designed rules in resolving cases, but they are performing part of their greater, yet salient, function. Whether this function, and this power, is ultimately abused is a separate matter, but as H.L.A. Hart reminds us in his examination of the concept of formalism:

‘In fact all systems, in different ways, compromise between two social needs: [a] the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and [b] the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in concrete case.’³⁵

In this way, while the formal design and/or ascertainment of rules fulfils the first need, the process of legal fictions fulfils the second, and the two are interrelated and should be conceptualized together. After all, the communities which cherished too much the first at the expense of the second, ending up perishing. Of course, legal fictions is not the only process through which formal law is adapted to its environment, but merely the first to historically appear. This brings us to the second agent to historically appear, ‘Equity’.

4.2. Equity

According to Maine’s use of the term, ‘Equity’ refers to bodies of rules founded, and justified, upon distinct (usually moral) principles which, while not already established as (customary) law, supersede established (customary) law and gain legality (or an ever-increasing legal relevance) due to the high normativity which their content exerts upon a society. Maine describes the process of this agent, with the following words:

‘The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity [...] differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. [...] On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform.’³⁶

Recasting the process of this agent in international legal terms: it speaks of a body (or bodies) of rules which exist next to settled international law but displace such settled law (and even manage to become law solely/primarily) due to a robust *opinio juris* (even in spite of little state practice), which itself flows out of the normativity generated by its (moral) content. While odd at first sight, once we become accustomed to this idea, we see processes of ‘Equity’ all around

³⁵ Hart, CoL, at p. 130

³⁶ Ancient Law, at p.28

us in CIL. Human rights are a suitable example of this; although humanitarian law also comes to mind. As Baker nicely summarizes:

‘At its most extreme, this scholarship argues that international treaties, especially those encompassing human rights obligations, actually generate international legal norms, because such conventions are inevitably not simply the codification of existing legal norms but rather the creation of new ones. [...] This non-traditional scholarship presents a framework which insists that the signing of a convention or treaty by a wide group of countries is, in and of itself, evidence of the creation of new customary legal norms. Although this non-traditional scholarship has ultimately been successful in redefining the sources of customary international law, such a move has not been without its critics.’³⁷

Human rights have traditionally been a body of rules which exists *next* to settled CIL. However, due to the high and increasingly pressing *opinio juris* this body of rules has received, due to the normativity generated by its moral content, certain efforts have been made to concretize human rights by ‘fitting them’ under CIL. No matter how one looks at it, though, grounding human rights within CIL cannot be the ‘declaration’ nor the ‘interpretation’ of existing law. On the contrary, this process is one of change, one through which new rules of CIL arise (and not merely as ‘instant customs’). As Baker continues:

‘This non-traditional scholarship would seek to establish a sound legal basis for the incorporation of human rights norms within the body of customary international law, but in doing so would attack the primacy of state practice and *opinio juris* as the sources of customary international law. [...] The ICJ’s finding in *Barcelona Traction* was used to justify the universality of human rights norms within the international system, while its judgment in *North Sea Continental Shelf* was used to justify a new understanding of the source of international law, one in which human rights norms by virtue of their inclusion in widely ratified international conventions were seamlessly transmuted into customary international law. [...] Countries would prefer the legal ‘fiction’ of claiming to be simply codifying existing norms within negotiated conventions, rather than asserting that new norms of international law were being created.’³⁸

Maine would argue this process of universalizing human rights, is creating/updating law to bring it in line with society’s continuously changing needs. Further, he would argue that rather than following the normal development of CIL formation, human rights receive ‘special treatment’, and get grounded in an ‘odd’ manner, due to the pressing needs their content responds to, as well as the high *opinio juris* their content receive from (at least) a large part of the international community. By failing to realize, though, how human rights get grounded, not as normal customary rules of law, but as agents of change and as ‘Equity’, the whole formula of CIL risks to collapse. Baker nicely closes this discussion by noting:

‘At their core, these push-backs argue that the reinterpretation of customary international law advocated by the non-traditional scholarship, one which, as has been seen, envisages the transformation of conventional international law into customary international law as a seamless process and minimizes the role of state practice as a key component in customary international law formation, poses a danger to the entire concept of customary international law. The reinterpretation

³⁷ Baker, at p.178

³⁸ Ibid, at p.180-181

of customary international law advocated by the non-traditional scholarship is, according to those who oppose it, one which seeks to move the sources of customary international law (i.e., state practice and opinio juris) away from their ‘practice-based’ methodological orientation and instead employ methods which are completely normative in nature.’³⁹

Maine’s perspective allows us to escape the perplexity which newly arisen customary rules pose for our understanding of CIL as such. Rather than a mere process of identification/declaration and interpretation, we see a whole universe of changes taking place right in front of our eyes; even if we cannot properly comprehend them yet. Perplexity, though, arises by the failure to understand that in reality we are dealing with two separate processes and ways of grounding legal rules. Whereas within international legal theory these two processes, being misapprehended as one, generated a ‘sliding scale’⁴⁰ perspective, Maine presents an alternative.

The traditional process of CIL formation (usually referred to as state practice + opinio juris) exists and functions separately, and parallel, to the later developed processes of Legal Fictions and Equity, which act as Agents of Change (rather than mere ascertainment/interpretation of existing CIL). In this way, Maine’s point of view dispels certain perplexities that surround CIL and paves the way for a more intricate understanding of the processes that compose, and flow out of, this normative system.

Once these perplexities disappear Maine allows us to see how rather than being ‘slowly generated’ and merely ‘ascertained’ and/or ‘interpreted’, CIL has a much more dynamic existence – without sacrificing its own separate ontology. Next to a continuously evolving international society, CIL (and the international legal order as a whole) also evolves through implicit mechanisms, and manages to cope with the changing social environment within which it exists and stems out of – even without any help from formalities, nor the concept of legislation. In this way, by reviving Sir Henry Maine’s works and legacy, a new vision appears for CIL.

5. A new vision for CIL

Looking at the bigger picture that Maine paints, we begin to see how it can benefit the philosophy of CIL by drafting out a new vision. First, CIL is law-properly-so, and it has been so since the very beginning, as it has been the case domestically as well – no concerns arise about its ontology. Second, CIL has as tools not only the traditional process of CIL formation, but agents of change such as Legal Fictions and Equity. Thus, rather than being formally ‘identified’ and ‘ascertained’, CIL has a whole set of intricate tools available at its disposal which aid its operation and further development.

Third, rather than blindly attempting to mimic the formalism and development of domestic legal systems, Maine’s perspective highlights other possibilities. While formalism might have been

³⁹ Ibid, at p.183

⁴⁰ See for example Anthea E. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, *The American Journal of International Law*, vol.95, N° 4, 2001

a necessary evil in the development of domestic legal systems, CIL benefits from a different, more stable, environment; and we should not be so fast to shed its customary skin. Rather than replacing customs with treaties, in their meaningful combination and collaboration we can find better ways to serve society.⁴¹

The Court in *North Sea Continental Shelf* already highlighted one possibility in the collaboration between the two – by stressing, and redefining/widening, the process a treaty can play in CIL formation. As such, international law has already begun making way for a different utilisation of custom; now it is up to the theorists to properly conceptualize these possibilities and employ them. Maine's legacy can prove to be of an invaluable assistance in this task. Further, Maine's evolutionary narrative speaks of a myriad of stages in between mere customary law and the current legislative structure of domestic legal systems.

The agents of change themselves resemble some of the traits that manifest in different evolutionary stages. This clearly exemplifies that the international legal order is far from the level of merely primitive (customary) law, although not yet on a par with the formal organization of domestic legal systems. More specifically the level of development of the legal system that Maine encountered in India in 1865 bears close resemblances to the current level of development of international law. One with a primarily customary nature (although with much codification), dealing with family-institutions, being administered primarily through Courts, which employed both Legal Fictions and Equity, but no coercion nor compulsory jurisdiction.⁴²

Adding, while CIL has not reached the point of a) full codification, nor b) legislation yet, this might be a blessing in disguise. In connection to this, I would like to highlight how Maine's perspective opens up doors for further discussions. Although both codification and legislation have proven necessary within the evolution/development of domestic legal systems, they have not been uncontroversial. Out of the philosophical legacy which grew out of Maine's work in legal history, a number of theorists took a more critical and evaluative stance against the processes of formal ascertainment and designing of law

Thus, while Maine only sought to *describe* the evolution of law/society and, as such, never evaluated the turn to formalism, nor took a stance against its processes; certain philosophers, following in Maine's footsteps, sought to scrutinize more the unintended consequences and pitfalls which followed this turn. Consequently, as means to highlight further the value of Maine's work and legacy for the philosophy of CIL and IL in general, before closing, the paper shall highlight two figures,⁴³ within the philosophical legacy which followed Maine's work, and their outlook towards formalism.

⁴¹ Prof. Thirlway drafted a similar vision for CIL in a controversial piece of work. Maine's legacy fully supports this vision and allows us to comprehend it in a more intricate manner; see Thirlway, H.W.A., *International Customary Law and Codification* (A.W. Sijthoff 1972)

⁴² From this perspective his work on the Indian village communities might yield valuable gems and insights about the conceptualization of CIL. See Maine, S.H., *Village Communities in the East and West* (John Murray 1871)

⁴³ Without suggesting that other figures, within the philosophical legacy which grew out of Maine's work, do not hold other invaluable contributions to make within the philosophy of CIL. More specifically, Maine's successors and disciples in the Oxford Chair of Jurisprudence, built a whole legacy (contra the Realists) around the concept of

6. Maine's Philosophical Legacy: James Coolidge Carter and Friedrich Hayek

James Coolidge Carter is another forgotten figure with notable achievements in his lifetime. He was one of the founders of New York City's Bar Association, and served as its president five times.⁴⁴ Prominently, though, he successfully led a campaign opposing the codification of the common law in New York (Field's civil code); which was nevertheless adopted, initially, by 24 states and, later, by at least 18 more.⁴⁵ This code was a Bentham-inspired project aiming at codifying and, inevitably, reorganizing/restructuring the customary part of the common law, with the aim of simplifying it. Despite the nobleness of the project, Carter was very sceptical.

Inspired by Maine, and the historical trend in the philosophy of law, Carter's main argument⁴⁶ was that insofar as the common law is primarily customary in nature it is living organically connected to the society it stems out of; changing, adapting and evolving *in practice*, mainly through the function of courts. A legal code, on the other hand, is a statute frozen in a particular point of time/development. This results in a) the detachment of norms from their environment, which in turn b) necessitates reliance on formal legislative enactments for the change, adaption and evolution of law. His concern stemmed from the fact that he was sceptical of the ability of a few selected men to create in the abstract legislated bodies of rules to replace and update existing, organically grown, customary and common law.

This brings us to the last figure we will be exploring: Friedrich Hayek.⁴⁷ Building upon this legacy, Hayek attempted to warn theorists of the dangers of legislation in practice. Grown customary (rather than formally made) orders intertwine and interconnect with the society that they stem out in an organic manner which is more complex than individuals can comprehend. Custom arises from a process which benefits from the knowledge of all subjects; while legislation does not. The formalities, and publicity, involved in abstract legislated norms places the whole process in a straight-jacket, limiting how far (and how complexly) the content can grow.

On the customary level though, before a norm can attain legal status, or even be a norm, it has to pass through a whole informal process of trial-and-error in the greater social arena. By being tested and refined in practice, in an informal manner, customary norms assimilate wisdom which is dispersed in a wide array of subjects and, as a result, gain greater complexity and congruence. Hayek claims that legislative processes, which allow men to impinge at will, and *at whim*, upon such an organically interconnected structure, risk a) compromising systemic integrity and social cohesiveness and b) inhibiting the customary process of grown norms which might be more capable of supporting society.

customary legacy – inevitably influencing their whole view of the nature and concept of law. I focus on this part of Maine's legacy, as well as on the debate with the Realists, in See Andreas Hadjigeorgiou, 'The legacy of Sir Henry Maine in the 21st Century', *Noesis*, Special Issue on the Philosophy of Customary Law, spring 2020 (forthcoming).

⁴⁴ See <https://www.encyclopedia.com/people/social-sciences-and-law/law-biographies/james-coolidge-carter> last accessed on 21/04/19

⁴⁵ See https://en.wikipedia.org/wiki/David_Dudley_Field_II last accessed on 20/04/19

⁴⁶ See Carter, J. C., *The Provinces of the Written and the Unwritten Law* (Banks and Bros 1889); and James Coolidge Carter, *Law: It's Origin, Growth, and Function* (The Knickerbocker press 1907)

⁴⁷ Friedrich Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1982)

This philosophical perspective raises the claim that whereas codifications (or formal ascertainment in general) and legislation (or formal design) might seem on the surface as perfect solutions, they might have critical adverse effects. In practice, codification might detach law from its environment, inhibit its evolution/development, and adulterate its implicit, organically grown *out of practice*, rationality. Concerning legislation, the possibility exists that both its formal processes might constrain the complexity of the norms it produces, and that we might lack enough knowledge about law and society to employ it successfully. Such a *Mainian* point of view, warns us to not be so fast in uncritically accepting or idolising the paradigm set by domestic legal systems, formalism might not be the only way, and it might not be the best way.

7. Conclusion

Sir Henry Maine and his legacy reveal a unique, yet forgotten, philosophical perspective, a perspective which poses significant challenges for the dominant ways of thinking about (customary) international law; and a perspective which remains largely unexplored and underutilised within its philosophy. Employing this perspective, though, allows us to realize that rather than being an odd, irregular or dysfunctional instance of law. CIL is a fully-fledged dynamic phenomenon, one which presents us with new, more intricate possibilities about how law ought to be conceptualised and how it could be further developed; possibilities that we should not be so fast in dismissing.

In this way, this lost legacy highlights a forgotten philosophical perspective which scrutinizes the formalism so cherished by domestic legal systems and challenges its paradigm by both raising concerns about its function and by revealing new intricate routes to consider. Thus, first and foremost, Maine's work strongly suggests that many of the ontological critiques that CIL and international law as such have been confronted it with, stem from a historically incorrect understanding of law's genesis and its development into a legal system.

From this perspective, formalism is merely one characteristic, process and ideology that law historically developed, and it does not hold the key or the essence of law as such – a turn that did not come without hidden pitfalls and unintended consequences. Thus, second, part of the philosophical legacy that followed Maine's work, took this a step further by questioning whether the turn to formalism outweighed those pitfalls and consequence – strongly raising the possibility that formalism might not be the only route, and it might not be the best route, for the development of CIL and international law in general.

This inevitably opens doors and provokes new conversations and debates, which promise to inevitably enrich international law's philosophical conceptualization by establishing a new school of thought; that of *Evolutionary Positivism*. Consequently, reviving Maine and this legacy becomes a paramount, urgent, and at the same time exciting task for international legal theory in general, and the philosophy of customary international law in particular.