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## Beyond Formalism

### Reviving the Legacy of Sir Henry Maine for Customary International Law

ANDREAS HADJIGEORGIOU

#### 1 Introduction

Sir Henry Maine is a curious figure.<sup>1</sup> During his time, he was a most famous legal theorist, whose name and fame did not manage to survive the test of time. Nevertheless, his works gave rise to a legacy whose revival can prove invaluable for international law (IL) and, more specifically, customary international law (CIL). This is especially the case as it concerns ontological questions.

While we live in a ‘post-ontological’ era, ‘where the existence of a genuinely legal international order can be safely presumed’,<sup>2</sup> not all ontological concerns have disappeared; rather they have shifted. Whereas IL is taken as a ‘given’, questions still remain about its *genesis* and the place CIL holds within it. Some, for example, deny the existence of CIL as law properly so called, while others urge IL to rid itself of the concept of CIL altogether. Further, this position intertwines with a *formalist* perspective – that is, that law is always the product of *formal design*<sup>3</sup> or *formal ascertainment*.<sup>4</sup>

<sup>1</sup> For an overview of Maine’s work and how it affected later generations see A Hadjigeorgiou, ‘The Legacy of Sir Henry Maine in the 21st Century’ (2020) 34 *Noesis* 159.

<sup>2</sup> C Pavel and D Lefkowitz, ‘Skeptical Challenges to International Law’ (2018) 13(8) *Philosophy Compass* 1, 2.

<sup>3</sup> 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; see J Austin, *Province of Jurisprudence Determined* (John Murray 1832) 6, 18.

<sup>4</sup> 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 what are otherwise mere customary rules to situations by judges. Of course, it should be mentioned, that most of the Realist schemes still cannot account for international law as

Accordingly, formalism in its moderate form treats formal sources, documents and/or proclamations as ‘better’ tools for both (a) the preservation of existing rules of CIL<sup>5</sup> and (b) the ‘creation’ of new legal rules. At its more extreme, formalism purports the view that (c) IL (or even CIL) finds its *genesis* only in formal sources, documents or proclamations.<sup>6</sup> While some formalisation is undeniably helpful and even necessary, we should be more critical of this formalist paradigm. Moreover, these perspectives touch both upon the *genesis* of IL, but also on its *evolution* – that is, how law began and how it ought to be further developed. These positions set the wider themes of the chapter. By reviving the legacy of Sir Henry Maine, it seeks to give a new perspective on the *genesis* of IL as primarily CIL, as well as a new vision of how it should/could be further developed; a vision that goes beyond mere formalism.

## 2 The Curious Case of Sir Henry Maine

Sir Henry Maine gave jurisprudence a curious spin, one that ended up awarding him the Chair of Jurisprudence in Oxford (a chair later held by Hart and Dworkin). More than that, though, as the University of Oxford’s website testifies,<sup>7</sup> the chair was established as an effort to attract Maine to Oxford, while accommodating his ‘peculiar genius’.<sup>8</sup> While jurisprudence has always been a discipline built upon the intersection of law and philosophy; Maine redefined it.

His work attacked the philosophical approaches to law of his time. His claim was that they were based upon speculative narratives of how law began; designed to explain domestic legal systems as we experience them

non-law, mainly because such courts lack centralised enforcement and, thus, coercion to back up their decisions; see for example K Llewellyn and A Hoebel, *The Cheyenne Way Conflict and Case Law in Primitive Jurisprudence* (Oxford University Press 1941).

<sup>5</sup> The Vienna Convention, the Hague Conventions of 1899 and 1907, as well as the Geneva Conventions, are good examples.

<sup>6</sup> This comes in contrast with the more traditional view that CIL (or international law in general) finds its *genesis* in practices.

<sup>7</sup> [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 Legal Philosophy in Oxford, ‘About Us’ <[www2.law.ox.ac.uk/jurisprudence/history.htm](http://www2.law.ox.ac.uk/jurisprudence/history.htm)> accessed on 1 March 2021.

<sup>8</sup> This is a phrase used by his successor Pollock, in his inaugural lecture in Oxford, which was devoted to Maine; see F Pollock, *Oxford Lectures and Other Discourses* (Macmillan 1890) 147–68.

in isolation at a given point in time (the famous sovereign-legislative structures). Instead, Maine suggested that any conceptualisation of law should be based upon a solid historical understanding of law's genesis and evolution.

The mistake which they committed is therefore analogous to the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients. . . . It would seem antecedently that we ought to commence with the simplest social forms in a state as near as possible to their rudimentary condition. *In other words, if we followed the course usual in such inquiries, we should penetrate as far up as we could in the history of primitive societies.*<sup>9</sup>

Hence, Maine's work is not a complete theory of law, but rather blueprints for redefining the way law is philosophically apprehended within jurisprudence, by firmly relating law to its empirical, socio-historical dimensions. Maine's legal history paves the way for something we today coin as *interdisciplinary*. This enquiry led Maine to understand law as an evolutionary phenomenon and this account holds an astounding amount of invaluable observations, which have yet to be applied to the international legal order.

### 3 The Genesis of (International) Law as Customary (International) Law

Maine's most general theme is that law should not be seen as a static, externally imposed system of commands and/or judgments backed by threats; nor should it be seen as a 'new' nor 'recent' phenomenon. History makes it clear that order and law predate formal organisation, sovereigns or courts. Law's existence stretches from ancient times. Further, even domestically, law began *as custom*.

The simplest truism lies in the fact that later formally ascertained law was itself based upon pre-existing customs, the existence and authority of which was accounted for independently of the persons who came to proclaim them. Even more, the first formal proclamations were not legislative acts, but codifications of *customary law*.<sup>10</sup> Thus, custom is not merely a source of law, it is the first source. From this perspective,

<sup>9</sup> H Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (John Murray 1861) 118–19.

<sup>10</sup> Maine rightly points to the XII Tables of Rome as his primary example.

social order is the product of custom, or rather an interconnected network of customary practices, which manifest as one organic whole.<sup>11</sup>

Law, as customary law, is merely one functional subpart of this greater whole. This evolutionary idea was slowly cultivated into *interactionism*.<sup>12</sup> Order and law appear first as custom, which arises freely and unassisted through the simultaneous interactions of various individuals.<sup>13</sup> While law is organically connected to the greater customary network, it is at the same time analytically delineable.<sup>14</sup> Various theorists have made *interactionist* conceptualisations of the international legal order;<sup>15</sup> however the current section would rather build upon this idea using another theme.

As Maine observed, from the beginning of time individuals were not dispersed/unconnected, they were organised. However, they were not organised in societies/communities of individuals as one would expect; rather individuals were organised in societies of institutions, the primary of which was the family. These family institutions were equal units in terms of authority, and the only thing that stood over and above them was customary law – the thing that constituted them. 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

<sup>11</sup> Malinowski later came to label this whole as ‘culture’; see B Malinowski, *A Scientific Theory of Culture* (The University of North Carolina Press 1944).

<sup>12</sup> Fuller is generally known for paving this way for this idea, although he built a lot upon Maine’s work, see L Fuller, ‘Human Interaction and the Law’ (1969) 14(1) *AM J Juris* 1; further, Postema is most known for popularising this idea within general jurisprudence, see G Postema, ‘Implicit Law’ (1994) 13(3) *L& Phil* 361.

<sup>13</sup> Hayek, another interesting figure within Maine’s legacy, describes illuminatingly this process of how customs slowly come to function and come to be understood as law; see F Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press 1979).

<sup>14</sup> This claim was first made in such clear terms in B Malinowski, *Crime and Custom in Savage Society* (Kegan Paul 1926).

<sup>15</sup> For an interesting application to international law see J Brunnée & S Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010). For another interesting application (partly) to international law see W van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Ashgate 2014).

parent. Law is the parent's word, *but it is not yet in the condition of those themistes [judgments of justice/customary law]*.<sup>16</sup>

Customary law is, then, law properly so because that is the part of the greater normative system which organises 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 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 individuals, in order to be recognised members of the community, must belong to a family unit. Further, not every family unit will qualify. It is, thus, customary law which dictates that all recognised 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 realised that in other societies (customary) law designates the word of the *mother*.<sup>17</sup> As such, without assimilating within our perspective customary law, we are unable to understand a society in the same way that it makes sense of its own self and structure.

This has its own conceptual connection to international and CIL. Whereas looking at CIL from within domestic legal systems, it gives the impression that it is a deficient, problematic or an odd instance of law;<sup>18</sup> through Maine's evolutionary perspective, these characterisations disappear. Law began internationally, in the same way it began domestically, as customary law. Further, in the same way domestically customary law functioned to establish a society of family-institutions (within which the word of the 'father' was law), so did CIL constitute an international society 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

<sup>16</sup> Maine (n 9) 126. Emphasis added.

<sup>17</sup> See Malinowski (n 14) 75.

<sup>18</sup> See for example J Goldsmith & E Posner, *The Limits of International Law* (Oxford University Press 2005); A Carty, *The Decay of International Law* (Manchester University Press 1986); A Carty, 'The Need to Be Rid of the Idea of General Customary Law' (2018) 112 AJIL Unbound; J d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' in G Capaldo (ed), *The Global Yearbook of International Law and Jurisprudence 2015* (Oxford University Press 2016).

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.<sup>19</sup>

Moreover, as already noted, customary law also works to establish these atoms. After all, these family-institutions domestically, as these state-institutions internationally, are not entities which exist, or can be understood, independently of rules which first arise customarily. Rather, these state-institutions are *conceptual constructions*; the result of various rules working together. These include rules that states should be attached to a territory, together with rules which define such territories. Rules that dictate that each state should speak with only one voice and that only one voice from within each state can be accepted as authoritative at a time. It also concerns rules which attribute actions done by individuals to a 'state', etc.

Without such common rules to synchronise how and what various individuals see/understand as 'states', there could be no consensus that 'states' exist, let alone a whole international community of states. Further, rules such as these need by definition to be voluntarily accepted, and need to remain unchallenged, in order to operate. It is at such a foundational level that we must primarily situate our conceptualisation of CIL; at the level where a community constitutes itself freely and unassisted. This nicely brings to mind a quote from Philip Allott's 'The Concept of International Law':

The social function of international law is the same as that of other forms of law. It is a mode of the self-constituting of a society, namely the international society of the whole human race, the society of all societies. Law is a system of legal relations which condition social action to serve the common interest. ... National legal systems (including private international law) are part of the international legal system. International law takes a customary form, in which society orders itself through its experience of self-ordering, and a legislative form (treaties). The state of international law at any time reflects the degree of development of international society.<sup>20</sup>

From this perspective, sovereignty itself is itself constructed through CIL. Maine proposed this conceptualisation 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.'<sup>21</sup>

<sup>19</sup> Maine (n 9) 167.

<sup>20</sup> P Allott, 'The Concept of International Law' (1999) 10 EJIL 31.

<sup>21</sup> H Maine, *International Law* (John Murray 1890) 65.

This rule can be nothing else but a CIL rule. Maine highlights the primacy we must grant CIL over the state units which are constituted, and regulated, by it. This point of view bears close resemblance to what Kelsen argued about three decades later. It is also a perspective argued by Hart, Maine's successor in Oxford. In the last chapter of his *Concept*, 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.<sup>22</sup>

This analysis further highlights that CIL and domestic legal systems, at the most foundational level, are organically connected and work together to bring to life these state-institutions. In the same way individuals in ancient society used custom and customary law to constitute themselves as a society of family-institutions, so have individuals internationally used custom and CIL to constitute themselves as a society of state-institutions – and the two interconnect. State institutions internally came to employ a similar hierarchical structure to what was employed internally by the family institutions, as a prerequisite for participating in this international community.

Thus, the communities which failed to take on this internal hierarchical structure, were historically not understood to be real units of the international community and have failed to contribute to its development. Customary international law dictated a greater vision that each unit had to follow both internally and externally in order to 'count' as a true member of the international community. A unit which did not adhere, would not be coerced, but rather ostracised. Thus, CIL's efficacy rests on the fact that it contains the most agreed upon, and desirable, scheme of international co-existing.

As such, the ontological critiques that CIL has traditionally faced from the perspective of domestic legal systems seem to rest on an ahistorical understanding of the genesis of law. Further, this highlights another

<sup>22</sup> HLA Hart, *The Concept of Law* (2nd ed, Clarendon Press 1994) 224.

interesting argument. Without suggesting that international courts merely interpret and apply existing IL and CIL, to the extent that such courts deal with a pre-existing international community made up (at a minimum) of states, this suggests that an effective CIL is already in operation. It is CIL which (at the most foundational level) constitutes the international society – within which such judgments make sense.

#### 4 The Formalisation of Customary (International) Law

Rather than a special, or a defective, case of law, customary law reveals itself as the most fundamental and primary instance of law. Even the oligarchies, which later came to power, recognised its primacy, since even they only claimed to hold *knowledge* of customary law:

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. . . . [Nevertheless] what the juristical oligarchy claims is to monopolise the *knowledge* of the laws.<sup>23</sup>

Exactly because this customary organisation was more complex than lay individuals could comprehend, is why oligarchies were vested with such power. As Maine notes, this power was surely abused, but it still did not amount to Austinian command-sovereignty. Nevertheless, because there was abuse, once writing was invented societies wrote down, codified and (thus) formalised first those customary rules which were law. The XII Tables of Rome were Maine's primary example and Hart agreed: 'In Rome, according to tradition, the XII Tables were set up on bronze tablets in the market-place in response to the demands of the Plebeians for publication of an authoritative text of the law. From the meagre evidence available *it seems unlikely that the XII Tables departed much from the traditional customary rules.*'<sup>24</sup> Nevertheless, while this formalisation undeniably had its benefits 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

<sup>23</sup> Maine (n 9) 12. Emphasis added.

<sup>24</sup> Hart (n 22) 292. Emphasis added.

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.<sup>25</sup>

What Maine suggests is that insofar as law was primarily customary, it was continuously changing alongside society, driven by new social needs and a changing environment. That is, spontaneously developing *through practice* and always being ‘up-to-date’, in the following way. The two primary tools that practitioners use to familiarise someone to a customary practice are examples (of occurrences of the practice) and rules<sup>26</sup> – usually unwritten, that is customary. The two work together. As Wittgenstein reminds us, both rules and examples interrelate to properly triangulate meaning: ‘Not only rules, but also examples are needed for establishing a practice. Our rules leave loop-holes open, and the practice has to speak for itself.’<sup>27</sup>

Thus, while rule-governed practices might arise without the use of explicitly formulated rules, rules would still necessarily arise in order to (i) introduce/communicate the practice to others, (ii) settle differences and (iii) better preserve the practice in the participants’ collective memory. As such, at a conceptual level, interpreting customary practices is *first* the process of conceptualising rules *out of* an activity, and *second* the process of relating those rules to examples of it as a practice.

Thus, the two, rules and examples, intertwine; however while the rules are customary, examples of the practice take primacy. For a practitioner, the rules one employs in relation to the practice are accurate, and thus acceptable, if they properly explicate at least parts of the practice (i.e., the behaviour of those who engage in it). Nevertheless, whereas the rules remain the same, the practice implicitly grows and changes (even without the awareness of those who engage with it) as it learns to respond better to the same needs, or it begins to respond to new needs.

However, exactly because on the customary level the practice takes the forefront, as the practice grows, existing rules that once ‘fitted’, slowly begin to seem inaccurate or outdated. From there, new customary rules arise which might describe new or changed parts of the practice, even though the rules themselves might be perceived as ‘new (or better)

<sup>25</sup> *ibid* 21. Emphasis added.

<sup>26</sup> Hart presented a similar analysis, although he overvalued the independency of rules in relation to examples; see Hart (n 22) 125.

<sup>27</sup> L Wittgenstein, *Philosophical Investigations* (Macmillan 1953) [139].

descriptions' of the 'same-old' unchanged practice. The codification and, thus, formalisation of rules, though, severs its relation to the practice and 'freezes' rules in time.

While the practice (or examples of it) might still be used to interpret formalised rules; the evolution of the practice can no longer impact upon the validity of the rules. Whereas at the customary level the practice legitimises the rules, once rules are formalised, the situation reverses. In turn, the formalised rules might stop the customary practice from further evolving and, thus, from better responding to existing or changing needs. The same process applies to the formalisation of CIL. As Thirlway observes:

The difficulty is of course that customary law develops of its own accord, without there being any need for States to do more than continue their day-to-day relations, whereas a treaty regime can only be changed by deliberate act of the parties. Furthermore, as Professor Baxter has observed, 'The clear formulation of rules in a codification treaty and the assent of a substantial number of States may have the effect of arresting change and flux in the state of customary international law. Although the treaty 'photographs' the state of the law at the time of its entry into force as to individual States, it continues, so long as States remain parties to it, to speak in terms of the present.'<sup>28</sup>

Thirlway goes even further to note that codification might have a halting effect upon the customary practice of even non-parties to the treaty.

Thus so far as the States non-parties to the treaty are concerned, for whom the codifying treaty is only evidence of the state of customary law at a certain moment in time, a 'photograph' in Prof. Baxter's vivid expression, other evidence, in particular of practice since the treaty, may show that for such States the law has not stood still: but the treaty will remain strong evidence, not easy to controvert, that the law is still as the treaty states it, so that the treaty will undoubtedly have a freezing effect on the customary law even for States non-parties to it.<sup>29</sup>

Even interpretation of codified *customary* rules might completely detach from the underlying practice, as practitioners get overtaken with a textualist outlook. Such a zeal might even alter the underlying practice. On the customary level interpreting rules happens necessarily in relation to the practice which legitimises the rules and, thus, remains embedded

<sup>28</sup> H Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (AW Sijthoff 1972) 125.

<sup>29</sup> *ibid* 126.

within the greater social/cultural whole. The interpretation of codified/formalised rules, on the other hand, gets overtaken with other things which cannot operate on the customary level.

First, there are the specific words chosen to express the rule, then there is the section in which the rule appears within the overall treaty (or code), as well as the meaning that flows out of a systemic reading of a specific rule with the overall whole. Second, there is the matter of the 'author(s)', their imagined intentions, and an aura of being 'faithful' to that original plan. This could not be truer for IL, where textualist dogmatism is the norm,<sup>30</sup> to the expense of developing competing methods. As Peat and Windsor observe:

Interpretation in international law has traditionally been understood as a process of assigning meaning to texts with the objective of establishing rights and obligations. . . . As new insights on the practice and process of interpretation have proliferated in other fields, international law and international lawyers have continued to grant an imprimatur to rule-based formalism.<sup>31</sup> . . . [Thus,] the focus on rule-based approaches to interpretation, exemplified by the VCLT, means that international law lags behind other fields in which interpretive issues are examined in a more nuanced and theoretically informed fashion.<sup>32</sup>

Even where the object of interpretation is the codified rules of a customary practice, the sociological roots the content of the rules have with that customary practice (which is itself organically connected to a greater social whole) often get overlooked. This is of course the result of a fierce debate about the formal meaning of the *text*. As Bianchi wisely notes: '[T]he shackles of both formalism and radical critical approaches have sclerotised the debate by focusing on opposite, yet equally sterile, stances that refuse to take duly into account the more sociological aspects of interpretive processes.'<sup>33</sup> Maine's history cautions that while this formalist-culture arose 'normally' in the development of all societies, in most cases its benefits did not outweigh the problems it brought with

<sup>30</sup> See F Zariyev, 'A Genealogy of Textualism in Treaty Interpretation' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2018) 251.

<sup>31</sup> See D Peat & M Windsor, 'Introduction' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2018) 3.

<sup>32</sup> *ibid* 8.

<sup>33</sup> A Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (in) Determinacy and the Genealogy of Meaning' in P Bekker, R Dolzer, M Waibel & D Vagts (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010) 53.

it. Rather, this formalism imposed a 'staticness' and promoted law's detachment from the greater social whole, which for most societies proved fatal. Only those societies which managed to find ways to continuously alter and evolve their formalised law survived. Thus, Maine focused on those agencies which the 'progressive' societies used to develop their formalised customary law.

Before we say a word about these agencies, this evolutionary outlook challenges us to ponder about law's formalist turn(s). Rather than following the total-formalism domestic legal systems exhibit, the international legal order could follow a more moderate alternative where formalist elements are strategically employed to *supplement*, rather than replace, custom and CIL. By total-formalism I mean a state where (i) codification stops customary law from growing/evolving, (ii) custom is prevented from yielding new legal norms and (iii) from taking away legality from outdated ones.

This can be prevented by following what I shall call a 'strategic-formalisation', which involves a number of interrelated tenets. Despite their deficiencies, custom and CIL are more robust and concrete in producing order and the norms they produce do not suffer from any legitimacy concerns.<sup>34</sup> Further, uncodified CIL can be most advantageous in certain instances<sup>35</sup> and, thus, codification of CIL should be done selectively – primarily in the areas where practices have 'matured' enough and exist in a rather stable environment. Further, these codifications should not be seen as replacements of CIL but as supplements.

This means that codified customary rules should be interpreted closely with the customary practice that underlies them and should be used as aids to properly interpret the practice as well as the function it performs within the greater social whole. It further means that customary practice

<sup>34</sup> Hayek describes the differences between customary and posited/legislated/formally designed rules. He contrasts the two orders that can grow out of each kind of rule as grown versus made order (or also as 'cosmos' and 'taxis'). His most interesting observation is that grown orders can grow larger and accommodate much higher complexity than made orders, making them more valuable for human societies. Further, in the case of customary rules the question 'what makes this legitimately *our* rule' does not arise; see Hayek (n 13) 35.

<sup>35</sup> While space precludes us from dealing further with this, interesting arguments towards this position can be found in the works of Carter who fiercely (and successfully) fought *against* the codification of common law in New York. His claim was that uncodified, customary law can serve society much better than a code, as change happens slowly and robustly while ensuring maximum flexibility. See JC Carter, *The Provinces of the Written and the Unwritten Law* (Banks and Bros 1889); JC Carter, *Law: Its Origin, Growth, and Function* (The Knickerbocker Press 1907).

should be allowed to fill gaps or uncertainties within treaties by producing new customary rules. It also means that we should keep an eye out for the state of the customary practice, and the direction of its development, even after codification. The developments of custom and CIL remain relevant to law even in situations where it is contrary to established law. As Thirlway suggests:

[W]hen custom *praeter legem* begins, as a result of social development, so to encroach on the existing law's domain, as to verge on the *contra legem*, it can nonetheless be regarded, in the light of social development, as still only *praeter legem*, and as tacit law-making so as to effect a repeal. . . . This argument, it is suggested, remains a correct picture of how custom can develop law beyond, and eventually contrary to, a codifying instrument. . . . It is the increasing number of cases in which the codified law 'does not fit', in which it is natural and proper to apply a different rule, which eventually gives the new rule the status of law enabling it to override the codified law, on the general principle that *lex posterior derogat priori*. . . . Thus there can be little doubt that law deriving from the provisions of a multilateral codifying treaty can be modified by a subsequent general practice constitutive of international custom.<sup>36</sup>

As such, CIL should not only be allowed to exist *next* to formalised versions of itself, but under certain circumstances it might be valuable to allow CIL to exist/develop even *contra* formal law. Custom can not only invalidate existing law, but it might (a) evolve in a different version of itself or (b) create CIL different from what was formally envisioned/agreed. This perspective gives a conceptual and an ontological primacy to CIL. In this way, Maine's perspective forces us to consider as a viable alternative, what Thirlway posited as a prediction:

[S]o far from supplanting customary law, and reducing its field of operation to a minimum, the codifying of great tracts of international law will, on account of the practical and political difficulties of amending multilateral treaties, whether codifying or otherwise, give over the development of international law almost entirely into the hands of custom, operating upon and beyond the codifying treaties.<sup>37</sup>

This should not be taken to mean that IL should be merely CIL, rather, we should seek to requalify the position CIL holds within the greater matrix of elements which compose IL over and above CIL. This is a viable

<sup>36</sup> Thirlway (n 28) 131–32.

<sup>37</sup> *ibid* 146.

position because, despite its various other developments, IL still remains primarily CIL. Again, Thirlway points to a similar position:

[A] 'code' of international law produced in the form of multilateral treaty is, except insofar as it represents or becomes customary law, a code of obligations accepted by the States parties to the treaty, but not law. If the field covered by the treaty were one which was more or less unregulated by custom, and regulated in detail by the treaty, the consequence would be that in that field the only 'law' between the parties would be the single rule '*pacta sunt servanda*'.<sup>38</sup>

In this spirit, the last part of this examination will focus on drafting out some first steps towards reconceptualising the interrelations between certain IL components. The aim will be to place CIL at the forefront and find ways to preserve and supplement its operation rather than replacing it. While formal elements will be strategically employed, this scheme escapes formalism by not aiming to alter (or formalise) the primarily customary nature of the international legal order.

## 5 The Development of Customary (International) Law

While the formalisation of customary law proved fatal for most societies, Maine focused on those societies that found ways to continuously alter and, thus, 'update' their formalised customary law. Maine calls these agencies of change: '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.'<sup>39</sup> While legislation, as the deliberate making of a rule, would seem to be the most obvious agent of change, it was the last to appear. Each agent drastically altered the legal practice, enabling it to adjust better to the changing social environment it was embedded in. As such, each was a sign of progress and brought law closer to systematisation. We should not be surprised to find both legal fictions and bodies of equity within IL.

While IL surely lacks the kind of legislation that can be found domestically, this clearly signifies that, despite its mainly customary nature, IL is more developed than mere CIL. Of course, exactly because these agents were employed in a state of total-formalism, as a way to override outdated

<sup>38</sup> *ibid.*

<sup>39</sup> Maine (n 9) 25.

formalised customary law, they produced new formalised rules which did not necessarily correlate with underlying customary practices. Nevertheless, their relationship can still be amended.

### 5.1 *Legal Fictions*

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.<sup>40</sup>

In its most basic terms, this process can be termed as (radical) reinterpretation of formal rules, although it could be extended to include evolutive interpretation.<sup>41</sup> In such situations, while the rule formally remains the same, the way it is (re)interpreted reshapes its function. When individuals were confronted with new problems and needs, they threw old rules into previously non-envisioned situations, thus recasting them. Maine points to an interesting example.

As mentioned, ancient society was organised in family-institutions that were connected through common lineage. However, the lineage requirement became too restrictive for an evolving society which was confronted with a new problem: the slow growth of the community. In this scenario the lineage rule was thrown in a new situation and it was recast through a process of legal fiction by reinterpreting it together with another newly arisen concept: adoption. Without the rule ever changing, its operation was drastically altered once common lineage could be established through adoption.

This allowed society to grow out of an outdated formalised customary rule without ever formally changing it. This definitely applies to formalised IL, which evolves implicitly both through the practice of individuals

<sup>40</sup> *ibid* 26–27.

<sup>41</sup> For discussions on evolutive interpretation see F Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill Nijhoff 2019) 73, 95; C Djeflal, 'Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts?' in HP Aust & G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 175.

(at least those who act on behalf of states) and international courts/tribunals. The ultimate test of whether a specific instance is one of legal fiction or a mistaken interpretation will be the acceptance of the community as a whole – thus, altering CIL. The need for the legal fiction to lead *back* to CIL is especially important in the case of international courts/tribunals whose judgments in this instance would be *sensu stricto ultra vires*. As Baker notes:

The problem which arises however is that while neither the ICTY nor ICTR 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.<sup>42</sup>

Further, as it concerns courts/tribunals, at least internationally, legal fiction should not be limited to this radical or evolutive, (re)interpretation of already existing formalised rules, but it should be extended to encompass one more instance. International courts help IL grow not only by reinterpreting and, thus, breathing new life into old rules, but by also establishing new CIL and altogether new rules. While courts cannot account for the entirety of CIL, as some theorists would claim, they do account for a portion of it. This is not necessarily a bad thing.

As for all concepts, CIL does have a ‘core of settled meaning’, that is rules/practices that are *definitely* law, and a ‘penumbra of uncertainty’. Within this penumbra, though, the requirements of CIL identification can be most problematic and perhaps restraining, thus halting the development of law. It is within this penumbra that international courts/tribunals can best operate to create new CIL through legal fictions. While this process allows room for abuse, there is a safeguard: looking back for community acceptance and CIL-practice.

If we ensure that the decision has been accepted and embedded within CIL practice, then it is irrelevant whether the decision was a process of mere interpretation or legal fictions. In instances of legal fiction an *ultra vires* decision can be legitimised and legalised *ex post facto*, that is through CIL-practice, after it is issued, thus contributing to the growth of CIL. The opposite might also hold true, a decision that is followed by

<sup>42</sup> R Baker, ‘Customary International Law in the 21st Century: Old Challenges and New Debates’ (2010) 21(1) EJIL 173, 185.

little or no practice, or even uniform but contrary practice, might fail to make IL for the right reasons.

By reconceptualising this process and ensuring that it leads back to CIL, we shorten the gap that exists between legal fictions and the community that has to live by their results. Insofar as the results of these fictions get accepted, they give rise to new practice, which in turn further develops CIL and IL as such.

## 5.2 *Equity*

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*. [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.<sup>43</sup>

Recasting the process of this agent: it speaks of bodies of rules which exist next to settled IL 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 bodies of ‘Equity’ all around us. Human rights are a suitable example of this.

Human rights began as a body of formalised (moral) rules enshrined in formal treaties. Nevertheless, and despite little state practice in certain areas, human rights began making claims *as* CIL due to the high *opinio juris* their content amasses. In recognising the need for CIL to develop to include human rights, certain theorists sought to redefine the CIL formation and identification formula which proves to be too rigid to allow CIL to grow in this instance. However, as Baker notes, this was not without its problems:

At its most extreme, this scholarship argues that international treaties, especially those encompassing human rights obligations, actually generate

<sup>43</sup> Maine (n 9) 28.

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.<sup>44</sup>

The problem Baker describes is a real one. Such a move would bring us closer to total-formalism by detaching CIL completely from the practices which underlie it. This is opposite to the vision the present chapter is suggesting, and Baker seems to agree:

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 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.<sup>45</sup>

This pitfall can be avoided by recognising, as Maine suggests, that we are confronted with two separate processes. The claims human rights are making within CIL should be neither confused *nor confounded* with traditional CIL formation and identification.<sup>46</sup> Bodies of equity, such as human rights, get grounded as *new* CIL differently than slowly arising practice-based CIL. Unlike traditional CIL, human rights are formally designed, but the moral principles they derive their force from hold such persuasive force, which is capable of overriding the lack of practice.

In this way, Maine's findings highlight the need to conceptualise a new mode of grounding within IL, that of bodies of equity, which run parallel to CIL even if they ultimately seek to be assimilated within it. Creating a separate conceptualisation for the processes of equity allows us to preserve the integrity of CIL and how it has been traditionally perceived, while discerning various other newly arisen normative systems

<sup>44</sup> Baker (n 42) 178.

<sup>45</sup> *ibid* 183.

<sup>46</sup> Reconciling the two could contribute to the decay of CIL; for such a 'reconciliation' see A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) *AJIL* 757.

interrelating with it. This, in turn, reveals new ways of perceiving the international legal community and highlights new possibilities for its development.

Furthermore, the operationalisation of the concept of equity in this context does not stop at human rights but extends beyond it. For example, it could be used to reconceptualise the role and legitimation of international organisations (IOs) within the international legal order.<sup>47</sup> International organisations should then be seen as entities which take abstract values and principles (whether moral or otherwise) and slowly generate concrete bodies of equity, in the form of rules, out of them. Their legitimacy could then be drawn out of these wider values and principles they stand on, as well as out of the relation these values and principles hold with the greater international legal order and the individuals that comprise it, without replacing the concept of CIL.

From this perspective, the legitimacy of IOs is not static, nor uniform, but rather dynamic and dependent upon the wider set of values and principles each operates under. Further, the function of IOs also becomes clearer. By slowly generating rules out of such abstract values/principles, they play a large part in the evolution of IL. This is the case regardless of whether IOs directly create IL through treaties or whether they create bodies of soft law. Both treaties and soft law, in this context, can establish common accepted frameworks which may synchronise state practice and enable new CIL to arise, thus developing IL. Under this vision, IOs, as well as the bodies of equity they produce, do not replace CIL but rather supplement its function and expand upon its operation without necessarily altering IL's primarily customary nature.

## 6 Conclusion

Looking at the bigger picture Maine paints, we can begin to see how it can benefit the philosophy of CIL and draw some overall conclusions. 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, which aid its evolution into a legal system. Thus, rather than being

<sup>47</sup> For an overview on the legitimacy and legitimation of IOs see J Tallberg & M Zürn, 'The Legitimacy and Legitimation of International Organizations: Introduction and Framework' (2019) 14 RIO 581.

formally 'identified' and 'ascertained', rules get grounded as CIL in a variety of ways, and there is a whole set of intricate tools already in operation which have been hiding in plain sight. In this way, the development of IL has not been so different from that followed by domestic legal systems.

Third, rather than blindly attempting to mimic the total-formalism of domestic legal systems, Maine's perspective highlights other possibilities. While formalism was 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 or tamper with its customary skin. Rather than replacing customs and CIL with treaties, in their meaningful combination and collaboration we can find better ways to serve society. Maine's legacy can prove to be of invaluable assistance in this task.

Further, Maine's evolutionary narrative speaks of a myriad of under-explored 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 mere customary law. Nevertheless, IL is still retaining a primarily customary nature and this might not be such a bad thing.

Maine's legacy paves the way for a different utilisation of CIL within the international legal order, and it is up to theorists to follow in Maine's footsteps and re-conceptualise IL along those lines. Thus, the present chapter suggested some first steps to how such a Mainian reconceptualisation of CIL could look, opening doors for new ideas and debates to take place. At its core, this forgotten legacy gives reasons for international legal theorists to resist the total-formalism so heavily promoted by domestic legal systems and its advocates. Furthermore, Maine's work highlights a new vision where CIL gets supplemented, rather than replaced. In this way, 'strategic-formalisation' can enable us to further develop CIL into a legal system, without necessarily altering IL's primarily customary nature. In turn, this provides some new arguments/positions to old debates.

The present chapter, thus, hopes to be one of the first in a line of papers which seek to revive, refine and apply this lost evolutionary legacy to the international legal order. Maine, and those who followed in his footsteps, present an untapped pool of information, a forgotten school of thought that has never been applied to IL. And this school of thought, as a new way of thinking about law and society, can provide some much-needed theoretical foundation to a decaying CIL. The author is curious to see where this legacy takes us.