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David Hume's Philosophical-Policy and the Failure of Hart's Concept of Law to Recognize an International Rule of Recognition in '*Sovereignty as Effective Control*'

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Abstract

This essay argues that the positivist predisposition to philosophically impoverish their arguments leads to an inadequate and imprecise understanding of international law. In contrast, by taking a whole systematic philosophical argument, in this case from David Hume, and examining it through Philosophical-Policy and Legal Design (PPLD), the comparative poverty of Hart's concept of law can be illuminated. Instead of a positivist concept of law based on a false classification of primary and secondary rules, and the denial of international law as law, the true priority of what Hart calls 'secondary' rules as well as their existence within international law will be demonstrated through Hume's argument for the evolution of social convention, Justice-As-Sovereignty and 'effective control' as an international rule of recognition. The increased complexity and norm-sensitivity of Hume's concept of law will also be argued to create a greater taxonomy of philosophical concepts than the one-size-fits-all positivist category of 'norm'. Evidence from both the *Lotus* case and the *Isle of Palmas* arbitration will be used to demonstrate how Hume's *concept of law* better illuminates international legal practice.

Keywords: Philosophical-Policy and Legal Design (PPLD); Concept of Law; Hume's concept

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In my work[1] I am not claiming that Hume, Hegel or Kant, wrote specific paradigms for the understanding and analysis

1 PPLD is the protocol I have developed for deciphering paradigms from whole, systematic philosophical arguments dealing with different characterizations of practical reason and moral agency and applying them as paradigms to illuminate issues of law and public policy. PPLD has been developed over a considerable number of years and its evolution can be traced through these books: Gillroy, John Martin. (Forthcoming). *The Ascent Of Public Order Principles In International Law: Philosophical Method, G.W.F. Hegel & Recognition Of Authority Beyond The State*. Palgrave-Macmillan; Gillroy, John Martin. 2013. *An Evolutionary Paradigm For International Law: Philosophical Method, David Hume & The Essence Of Sovereignty.* Palgrave-Macmillan; Gillroy, John Martin & Breena Holland with Celia Campbell-Mohn. 2008. *A Primer For Law & Policy Design: Understanding The Use Of Principle & Argument In Environmental & Natural Resource Law*. WEST: AMERICAN CASEBOOK SERIE; Gillroy, John Martin and Joe Bowersox. (eds.). 2002. *The Moral Austerity of Environmental Decision-Making: Sustainability, Democracy, And Normative Argument In Policy And Law*. Durham, NC: Duke University Press and Gillroy, John Martin. 2000. *Justice & Nature: Kantian Philosophy, Environmental Policy, and the Law*. Washington D.C.: Georgetown University Press. In addition, these articles and chapters of mine offer insight in to the details and development of various components of PPLD and their application to a cross-section of law and policy issues: "Philosophical-Policy & Legal Design: A Moral Argument For Ecosystem Policy And A Transition To The Anticipatory Regulation Of Environmental Risk Given The COVID 19 Crisis" 2020. *The Palgrave Handbook On Environmental Politics, Activism, And Theory*. Palgrave MacMillan (Forthcoming)'; Gillroy, John Martin and Oran Doyle. "Philosophical Foundations of Natural Rights" in R. Grote, F. Lachenmann and R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP Oxford 2019); "Toward An Environmental Law Of Essential Goods: A Philosophical And Legal Justification For 'Ecological Contract'" 2018. *International Journal of Tecnoethics*. Vol. 9, No. 2.; "Practical Reason And Authority Beyond The State" in Capps, Patrick, and Henrik Palmer Olsen (eds.) 2018. *Legal Authority Beyond The State*. Cambridge University Press.; "Hume Philosophical-Policy and the International Law of Nuclear Weapons" *Journal of Defense Studies & Resource Management*

of international legal practice. I am contending that they left, in their arguments, a philosophical logic of concepts focused on human agency and the law, that once deciphered, can be sorted into a standard PPLD[2] paradigm structure that then can be applied to contemporary legal-policy issues, including the origin, current dilemmas and future of international law. PPLD assumes that philosophical argument, while created in a specific time and place, also leaves a conceptual argument, that once properly organized in necessary categories, provides the raw material for a PPLD paradigm that can faithfully transmit the philosopher's fundamental assumptions and imperatives for use outside the time, context and contemporary applications of that philosopher. PPLD offers a method or protocol with which one is able to distill those specific components of any philosophical argument necessary to law and policy, considered as a timeless pursuit of human reason and agency, and apply their imperatives to a wider range of modern legal and policy issues. This protocol allowed me to decipher a full and complex model of the origin of the international legal system from the logic of concepts drawn from Hume's philosophical argument. [3]

One result of deciphering Hume's PPLD is a reconsideration of H.L.A. Hart's concept of law,[4] especially in his contention that, first, international law is not law, and second, that it fails to be law because it lacks a rule of recognition. Specifically, after examining Hart's approach, the increased complexity and norm-sensitivity[5] of what I define as Hume's Philosophical-Policy and Legal Design (PPLD) will be used, first, to detail the distinction between social convention and 'custom' as foundations for law. Next, Hume's paradigm will illuminate international law as having what Hart calls 'primary' and 'secondary' rules, but also show that they arise in reverse order from Hart's claims, that is, with secondary rules arising before primary rules. Lastly, the status of international *law* will be confirmed, through Hume's PPLD, by the deciphering of its core process-norm, Justice-As-Sovereignty, and its local rule of recognition in 'effective control of territory'.

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Hart's argument in the *Concept of Law*[6] begins with the distinction between habit or custom, and law. Specifically, his approach to the evolution of law is that "convergent habitual behaviour"[7] is only the first step in a process that eventually arrives at a formal system of rules that are, in contrast to habit or custom alone, "effective, normative,[8] and create a sense of justice among a population".[9] Hart, like Hume, acknowledges

4:1 (2016); "Philosophical-Policy & International Dispute Settlement: Process↹Principle And The Ascendance of the WTO's Concept Of Justice", 3 *Journal of International Dispute Settle*ment 53: 59-73 (2012); "A Proposal for 'Philosophical Method' in Comparative and International Law*" Pace International Law Review.* (2009); "Justice-As-Sovereignty: David Hume & The Origins Of International Law" *British Year Book of International Law*. 79: 429-479 (2008); "Adjudication Norms, Dispute Settlement Regimes & International Tribunals: The Status Of 'Environmental Sustainability' In International Jurisprudence" *Stanford Journal of International Law* 42: 1-52 (2006); "Kantian Ethics & Environmental Policy Argument: Autonomy, Ecosystem Integrity and Our Duties To Nature" *Ethics & The Environment* 3: 131-58 (1998); "The Ethical Poverty of Cost-Benefit Methods: Autonomy, Efficiency, and Public Policy Choice" *Policy Sciences* 25:83-102 (1992; "The Literature of Comprehensive Policy Argument" *Policy Currents* 2:8-9 (1992); Public Policy and Environmental Risk: Political Theory, Human Agency, and the Imprisoned Rider" *Environmental Ethics* 14: 217-37 (1992); and "A Kantian Argument Supporting Public Policy Choice" in Gillroy, John Martin and Maurice Wade (eds.) 1992. *The Moral Dimensions of Public Policy Choice: Beyond the Market Paradigm*. Pittsburgh: University of Pittsburgh Press. Pp. 491-516.

2 See, Gillroy *An Evolutionary Paradigm*, Chapter 1 and *The Assent of Public Order Principles,* Preface.

3 See Gillroy *An Evolutionary Paradigm For International Law: Philosophical Method, David Hume and The Essence of Sovereignty* (Palgrave-MacMillan 2013) for a full application of Hume's philosophical argument to the origin of the international legal system.

4 Hart, *Concept of Law*.

5 "Increased complexity and norm sensitivity" is meant to suggest that one of the ways in which legal positivism has dispensed with philosophical matters, is to redefine moral-philosophical terminology and nomenclature so as to conflate moral distinctions into positive categories that grant quasi-moral status to positivist theory without it having any genuine philosophical value. For example, by categorizing anything and everything that incurs agency as 'normative', positivism can simultaneously kill important philosophical distinctions between informal and formal legal practice while granting normative status to ideas that neither rise from moral imperatives or incur obligation/duty of performance. Legal Positivism's predisposition to categorize anything and everything as an indistinguishable 'norm' is one of its most critical structural flaws. (See Singer *The Legacy of Positivism,* 21-22.

6 This paper considers not what critics or the secondary literature on Hart think he 'believed' as to his concept of law, but what Hart's argument, as an integrated logic of concepts, argues about rules, custom and the status of international law. Consequently, while I am familiar with a considerable amount of this secondary literature, I have not included reference to it, as it is irrelevant to, and distracting from, what Hart is really arguing as a self-contained paradigm for application to the 'concept' of law.

7 Hart, *Concept,* 10.

8 Hume's PPLD makes this term more complex but also more definitive. It allows us to see that the definition of normative has both a *thin* and a *thick* variant. Positivist legal theory conventionally defines normative as any 'reason for action' which I will call the *thin* variant. This thin definition carries over into international legal theory where almost anything, a habit, a rule, a custom, a source of law, a piece of blackletter law, is considered a 'norm' or normative without distinction. Philosophers and most other scholars consider 'normative' to require not just being 'moved' but accepting an obligation or duty to act on a or moral imperative. This I will designate as the *thick* variant. Because my deciphering of Hume's PPLD illuminates the thin-thick distinction, I am using normative in the thick sense, to make a distinction between Hart's definition of custom which he argues does not have the 'internal aspect' that would make it normative in the thick sense, and a rule that does have this quality. One of the reasons to use PPLD is that it allows a much finer moral taxonomy of concepts (an increased complexity and norm sensitivity) than does positive legal theory.

9 Hart, *Concept,* 9-11. Commentators have said that Hart does not "believe" this but as this quote demonstrates, his argument does. This is a perfect example of how the settled beliefs of commentators in the secondary

that the first regulation of human interaction is through the process by which habits are formed and then expanded to a social level of operation. However, unlike Hume, Hart does not see this stage of evolution as either a moral or a legal one. Hart argues that there is no "internal"[10] aspect to this behavior, an attribute which is necessary from within Hart's logic for anything to have the character of law.

When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there should be such a habit no members of the group need in any way think of the general behaviour… It is enough that each for his part behaves in the way that others also in fact do. By contrast, if a social rule is to exist some must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal'[11] aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.[12]

Hart argues that custom[13], unlike the law built upon it, does not impose moral obligation, nor is it necessarily effective in any way for the social cohesion or progress of the society. Custom is merely convenient and represents the indiscriminant manner in which people act collectively. These informal customary guidelines are therefore non-normative.[14]

Hart's informal patterns of behavior are capable of producing rules, but only of a type that utilizes command to invoke obedience or impose duty. A customary system of rules breeds what Hart calls substantive or "primary rules".[15] Habits turn into orders to maintain established patterns of behavior and these, in turn, invoke obedience through command. Hart sorts international law into this pre-procedural state of affairs.

…though it is consistent with the usage of the last 150 years to use the expression 'law' here… the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.[16]

His classification of international law as a "simple form of social structure" is the basis on which Hart then proceeds to create a full model of what he considers a "developed legal system."

The key to a fully developed concept of law, for Hart, is the presence of codified *rules* rather than mere habitual *practice*. Hart's logic makes practice a non-legal arena where the system of primary rules alone is incapable of adequately defining "the *content* of laws, …their *mode of origin*, … or their *range of application*",[17] all of which are necessary for a fully developed legal system to emerge. Hart argues that with a base in custom (as he defines it), substantive or primary rules evolve to create the appearance of a legal system, but, since there are no specific legal rules that establish the general validity of these practices, custom merely breeds uncertainty.[18] Customary practice[19] also offers no way to overcome what Hart calls the "static quality"[20] of primary rules of command and obedience. Lastly, he argues that a system of customary primary rules is inefficient[21] for the settlement of conflict and the dissolution of disputes.

To solve these shortcomings, Hart suggests that uncertainty requires a "rule of recognition",[22] that the static quality of primary rules needs a "rule of change",[23] and that

literature takes on a life of its own independent from Hart's stated argument.

10 Hart, *Concept,* 10-12 for Hart's rejection of metaphysical content in law. This is also another point where the secondary literature argues that for Hart custom does not lack "normative" or "internal" character" when he plainly, as in the quote, says that it does. Hart does not separate a habit from a custom, but associates these ideas. His distinction is between a habit/custom and a rule, where only the latter has the 'inner' quality and is therefore normative in the 'thick' sense of being more than just something that provokes action but something that makes action a duty or obligation. On the other hand, Hume does separate habit from social convention and makes the latter truly normative.

11 The secondary literature does not give Hart credit for this attempt to separate a thin sense of normative from a thicker sense by his focus on the standard of "internal aspect". This because of their attachment to the thin sense of normative that Hart, here, seems to realize in his effort to separate custom from rule, the former having no 'internal' or moral aspect and therefore no normative status.

12 Hart, Concept, 55.

13 Custom as a precursor to formal law must here be separated from customary international law, which is a formal source of law for the international system. Here again the secondary literature makes a case that Hart both recognizes customary law and duties from these, that is that they are normative. But this again confuses the connotation of normative as moral or creating moral duty and also the standard definition of duty which requires a thick sense of moral imperative, not just a vague sense of anything that moves one to action, like habit. The latter definition fits Hart, but is a lesser standard than is required for his concept of law as holding an 'inner' sense of obligation or duty, which his association of custom with habit makes inapplicable to the former.

14 In the moral or thick sense of normative, as creating an obligatory imperative.

15 Hart, Concept, 78.

16 Hart, Concept, 209.

17 Hart, Concept, 26.

18 Hart, Concept, 92 for confirmation of universality-certainty as attributes of law.

19 Custom not as 'customary law' but as used by Hart, in terms of non-obligatory habit or practice with a non-normative reason for action.

20 Hart, Concept, 93.

21 Hart, Concept, 94.

22 Hart, Concept, 92.

23 Hart, Concept, 93.

the inefficiency of an undeveloped legal system is reversed by a "rule of adjudication".[24] All three of these rules are contained within a single class of what Hart calls "secondary rules".

… they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operation. Rules of the first type impose duties; rules of the second type confer powers, public or private. …. rules of the second type provide for operations which lead… to the creation or variation of duties or obligations.[25]

Paraphrasing Austin[26], Hart claims that "… in the combination of these two types of rules there lies … 'the key to the science of jurisprudence' ".[27] Only with the addition of these secondary rules, according to Hart, will international law take that "… step from the pre-legal into the legal world".[28]

It is indeed arguable… that international law not only lacks the secondary rules of change and adjudication … but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules.[29]

From the standpoint of Hart's concept of law, international law is an undeveloped system of customary behavior and primary rules that has evolved from habit without a connection to that sense of obligation necessary to all legal systems.

The most prominent feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory.[30]

Hart's concept of law finds its distinction in the introduction of secondary rules. Law does not originate in custom because of the lack of a normative or "internal" character in the latter, its failure to invoke obligation, or create universality and certainty. However, with the creation of a class of procedural rules that speak to the validity and legitimacy of primary rules, law is born. Hart's logic also distinguishes law and morals so that the judgment of a valid law is distinct from an evaluation of its normative weight or status. He then separates law and justice so that "[j]ustice constitutes one segment of morality primarily concerned not with individual conduct but with the ways in which *classes* of individuals are treated".[31] Overall, while the "internal" aspects of the rules of law are important, and obligation to the law is one of its "prominent" features, the division in application of the concept of law between primary and secondary rules allows Hart to designate the latter rather than the former as characterizing law, valuing both primarily in terms of their positive validity.

The conclusion of his argument is that the internal, moral aspect of legal rules becomes an external, critical point of reference that allows valid law to exist independently of any normative entanglements. Hart describes this as an advantageous situation.

… something [being] legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[32]

Hart's definition of custom depends on establishing a dichotomy between practice and rule where the former has no necessary legal or moral effectiveness in terms of human society, while the latter requires it. His definition of "primary rules" also depends on a dichotomy between the external observation of behavior and its "internal aspect" that grants rules legal status. Here, a primary rule is only possible when the internal or normative aspect of the 'law' is added to an observed pattern of practice. However, the normative and observationally positive aspects of an act are not inherently related for Hart. Finally, Hart's definition of a secondary rule depends on a dichotomy between positive validity and normative obligation. Here, the morally neutral rules of recognition, adjudication, and change make practice *legal* through the valid acceptance of the secondary rules involved. This validity is then, and only then, as law, ready to be tested against the moral and obligatory requirements of primary rules with their post-customary "internal aspect". For all secondary rules, the separate aspect of moral obedience remains external and distinct form the rule's validity. Legal status is bestowed by the rule's distinctive but non-normative validity.

The core impoverishment of Hart's argument is in his promotion of *rule* over *practice*[33] and the resultant focus on the attribute of validity for specific types of rules, rather than on the dialectic pattern of practice that predates them. Hart devalues the role and normative complexity of pre-

24 Hart, Concept, 94.

25 Hart, Concept, 78-79.

26 Austin, Jurisprudence, Lecture 1.

27 Hart, Concept, 79.

28 Hart, Concept, 91.

29 Hart, Concept, 209.

30 Hart, Concept, 6.

31 Hart, Concept, 163.

32 Hart, Concept, 206.

33 Again, here the practice-custom-habit has no 'internal' normativity just a thin sense of being able to move one to action. Rule has the inner quality and, according to Hart, it is this quality that makes them valid-formal law.

legal custom and, in this way, prevents international law from being more than a pre-legal or "simple form of social structure".

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In contrast, examining Hume's philosophical argument through PPLD, that is, as a policy-legal paradigm, provides a distinct normative foundation that allows for greater contrast with Hart's concept of law. First and foremost, within PPLD, the policy/legal context is a assumed to have a core dialectic structure[34] characterized by the tension between *process*↹*principle*.

This dialectic assumes that there are two fundamental categories of normative precepts in the law. The first and most basic is that which evolves from repeated human interactions that breed patterns of behavior and set expectations for the terms of cooperation and social stability. These social conventions, as described by David Hume,[35] create the terms of social cooperation through practice and have three layers of progressive sanctions. Sanctions assure cooperation and become more centralized as the size and complexity of the social group increases. The primary layer focuses on one's sense of honor and the need for social approbation (stage one); sanctions then become focused on a specific norm or convention of justice (stage two) that holds the system together as its moral-focal point and then, finally, sanctions produce formal law and institutionalized governance through contract-by-convention (stage-three). The point of the norms generated by this source of morality is to establish and maintain the stability of collective action based on a sense of the public good/utility. These are *process-norms*,[36] and they form the moral foundation for laws that enable social coordination and stable cooperation over time. Social conventions informing/creating the positive law are easily entrenched as they become sensed as 'legitimate' authority by those dependent on the legal system, and therefore as necessary to the fundamental stability or order of society.

The second essential moral foundation for the law is transcendent of context and finds its origins in argument from fixed metaphysical principle, generated and justified by human reason.[37] These *aetiological* norms or *critical principles* do not depend on their social context for legitimacy, but contain their own internal critical standard of validity that is inherently disruptive of social convention; primarily in the name of the status of the individual vis-à-vis the stability of social cooperation. Critical principles, while they inform both the substantive and procedural dimensions of the law, are primarily substantive because instead of the stability of social process being the end-in-itself for these rules/ rights, it is the standing of humanity-in-the-person that provides their imperative.

The essential foundation for Hume's concept of law lies in the evolution of process-norms or social convention as distinguished from mere custom. The formal rules of law do not pre-exist for Hume, nor are they primarily creatures of critical reason and idea generation.[38] Formal legal rules are rendered by social conventions that have previously evolved through human interaction within society, in reaction to what is of social utility to that society's particular circumstances of justice.[39] The strategically neutral process by which alternative coordination equilibria are made attractive, routinized, and turned from unconscious, informal, collective action solutions into conscious rules or laws for human behavior, is anchored by the idea of a social convention and the subsequent stable practice it produces. This is a prime example of Hume's philosophical-policy reversing the positivist priority between practice and rules.

Hume denies that a general rule or principle could be established out of nowhere, prior to all practice. Rather, each individual recognizes that it will be beneficial to refrain from taking another's possessions only if others reciprocate this behaviour; given that we all have roughly the same psychology, significant numbers of persons will come to this conclusion separately, and be fairly assured that they are not alone in their understanding… this practice, has made them capable of explicitly formulating the idea of a convention. The convention emerges out of the practice, and only then can take on a life of its own…actions are only explicitly *guided by a rule* once practice is well established.[40]

Unlike Hart's concept of law, Hume's set of formal legal rules begins with unconscious human interaction that creates the foundation for the eventual formalization or codification of legal practice. Social convention shapes a system of accepted practice through the association of certain choices with the normative imperative to coordinate in society.[41] It

34 A philosophical-policy paradigm is assumed to be made up of dialectically interconnected ideas that overlap within a given philosophical system, while existing on a scale of forms, self-refining toward their essence over time though continued application and analysis. See, Collingwood, Leviathan, 181-182; Methods, 41-42.

35 Hume, Treatise, 486-89.

36 Gillroy, An Evolutionary Paradigm, 12-13; 25-26.

37 My project will rely on PPLD paradigms from Hegel and Kant for this normative category.

38 They are creatures of process not critical principle.

39 Hume Treatise, 495 describes the circumstances of justice as scarcity, limited generosity and a rough social equality.

40 Baillie, Morality, 172.

41 PPLD, employing R.G. Collingwood's Philosophical Method, suggests that the absolute presupposition of Hume's paradigm is the passion for a

also connects social convention with the idea of a process-norm of justice, like sovereignty[42], that forms the central standard, or moral focal point, of a concept of law, from which the positive law is thereafter created and evaluated.

With a substantial social history of sanctions evolved before the advent of formal legal rules, the concept of *valid* lawful practice takes on a more expansive role within Hume's philosophical-policy. Indeed practice, and its progressive sanctions of approbation and justice, stabilizes preceding stages of social order and, in this way, sets the normative standard for both the procedure and contextual substance or validity of the codification process.

Unlike both Hart[43] and Hobbes,[44] the idea of governance, let alone government, is not a precondition for the creation of a legal system. For Hume, governance is merely another transitionary stage in the scale of forms that institutionalizes conventional behavior for the continued persistence of society as its complexity grows. The promotion of conventional *practice* over formal *rules* makes Hume's argument both distinct from, and more normatively complex than Hart's. Hume's philosophical-policy transcends Hart's dependence on a non-dialectical system of primarily substantive law based on primitive custom. Hume also adds complexity by acknowledging the connection between morality and law, as well as obligation and validity. Thus creating a pre-formal-law "sense of justice"[45] that acts to give a more evolutionary sense of universality and certainty, the cornerstones of law, before formal rules are deciphered.

A Humean definition of justice focuses on the process-law that Hart denotes as secondary rules of *recognition*, *adjudication*, and *change*.[46] Hume discounts the primacy and particulars of specific commands or principles and fealty to them, which Hart defines as chronologically prior and "primary" in his concept of law. Hart's "secondary" rules are Hume's primary, while Hart's "primary" rules are Hume's secondary in the creation and refinement of a concept of law.

Most importantly, this reversal allows international legal practice full status as law. For Hume, formal law is a direct product of informal legal-conventional development where both are stages in an evolutionary scale of forms for his concept of law. This makes a place for international law within the multiple levels of evolving human organization that begin with social convention. Here, Hume's philosophical-policy suggests a more complex international legal system that heeds the requirements of its particular circumstances, on a distinct yet dialectically connected tier of social organization, and with a sense of governance distinct from most municipal systems of law.

Within Hume's logic, practice not only predates the existence of rules, but creates the legal content of rules through the evolution and codification of *social convention*. Within Hume's philosophical-policy and legal design, social convention is a more complex idea than mere custom because it replaces the series of dichotomies relied upon by Hart with dialectics that engage normative and positive, the external and internal aspects of practice, and the interaction of practice and rules to provide a more persuasive argument for the generic evolution of the international rule of law. The evolution of social convention also gives the international legal system a sense of justice based in the *process-norm* of Justice-As-Sovereignty and a rule of recognition in *effectiveness or effective control of territory*.[47]

Explicitly, social convention has three critical distinctions from the standard positivist assumptions about custom adopted by Hart. First, Humean social convention, unlike Hart's definition of custom, is built on an innate dialectic between practice and the generation of rules that makes social convention inherently *efficacious* in that it exists specifically to solve a collective action problem and is motivated by the passion for society and social order, upon which its public utility depends.

By engaging the tension between practice, and the need for certainty and universality in expectations that are provided by law, and by promoting practice over the rules of law, Hume transcends the mere social habits of individuals, by infusing human interaction with an *internal* foundation in our passion and sympathy for the creation and persistence of society. This passion is the root motivation of the search

stable social order.

42 For the international legal system in particular (more later, on this).

43 Hart, Concept, 209. Hart requires governance, through the establishment and implementation of secondary rules. There is considerable controversy and mistaken assumptions about Hart and codification, and while most understand him to recognize law (cannon, customary, common) that is not codified, within the context of his argument, both primary and secondary rules as constituent of a legal system represent the overlay of normative rules that invoke obligation, which is a form of codification. Hart is not Hobbes, who requires centralized and coercive government, but both assume an obligation to rules that must be substantiated by some sort of authoritative institutional structure to establish a legal system, which is a type of codification.

44 Hobbes, Leviathan, Ch.17.

45 Hume, Treatise, 345.

46 I argue elsewhere that in addition to a Local Rule of Recognition in Effective Control (which will be covered herein), Hume's PPLD also proffers a Universal Rule of Recognition in Peaceful/Reciprocal Cooperation, a Rule of Adjudication in the Progressive Codification of law and a Rule of Change in Non-Intervention. See Gillroy, An Evolutionary Paradigm.

47 This is a rule of recognition in that it sets the standard by which rules, laws, are recognized as valid. Which is Hart's definition.

for stability[48] and creates the need for legal rules of behavior as well as the normative obligation to heed these rules which regulate and counteract the existing circumstances of justice.

The natural or unconscious patterns of behavior and reciprocity eventually create a recognizable system of practice on the level of international society. At this point, a core social process norm arises as a sanction to effectively protect social convention: *Justice-As-Sovereignty*. Justice arises in response to its success in correcting for the rough equality, limited generosity, and scarcity of property that Hume argues creates the need for justice in the first place. Justice-as-convention (the second level of sanctions) regulates customary behavior at a point of coordination that corrects for these "circumstances of justice". The "artificial virtue" of justice as a manifestation of the coordination equilibrium, and a shorthand for it, represents legal practice for a specific representation of the international social order, allowing it to persist, and granting its process-norm moral weight. The essence of justice lies in the natural and unconscious dialectic of human passions.[49]

Globally, sovereignty is a *conventional process-norm*, a normative standard, evolved from the dialectic between agency and expectation. From this, agents can create and maintain coordination for their mutual benefit; that is, for the stability of the property of each and all and to execute collective action free of disruption.[50] The imperative of a Humean convention is to find consensus in the stabilization of property, which, in the international context, means giving each agent in the international system control of its own affairs. A nation's resources, whatever they wish to do with them, can best be stabilized through Justice-As-Sovereignty. Social convention on a national level solidifies the interdependence of persons within social community through rules relating to property that separate each person's possessions and make each the master of that which belongs to him as long as he restrains from interfering with the possessions of others.[51] Justice-As-Sovereignty, within the international system, creates the same 'legitimate' order on a global level. It does this by separating the effective control of possessions for each nation and granting each dominion over its own territory and wealth, as long as it restrains from interference in the domestic affairs[52] of other "civilized" nations.[53] Civilization is here defined as sharing the international circumstances of justice and acknowledging an obligation to the process-norm of Justice-As-Sovereignty. Hume's contention that international society can and does establish itself without government is based on the premise that a society of nations remains small, homogeneous, and the purview of but a few "civilized" nations with shared values and circumstances. This critical mass of cooperators have common expectations realized in Justice-As-Sovereignty and controlled by their own mutual sense of moral approbation and justice.

Hume's philosophical-policy elevates mere habit to a pre-formal practice rendered from one's natural propensity to create artificial 'laws' reflective of specific focused and normative motivation, even in terms of the unconscious choices and actions of persons. Within Hume's logic of concepts, Justice-As-Sovereignty maintains its validity and authority based upon its consistent propensity to create *effective* conventional practice, making this quality its rule of recognition.

This rise of convention may originally be unconscious, but is never mindless, nor is it ever without legal-moral purpose. The human passions generally, and the passion for society in particular, create practice that is a synthesis of habitual behavior and those informal rules necessary for social cohesion and order. This makes convention, as social practice, of inherent utility to human society, both immediately in an informal sense, and eventually, in a formal sense, as setting the legitimate standard for the codified rules that are created from pre-existing practice with the advent of political society.

The second critical distinction of Hume's approach, as contrasted with Hart's, endows all informal and formal legal rules with a dialectic between external patterns of human behavior and the "internal" moral aspects of those rules.[54] These external and internal aspects of Hume's concept of law, form a dialectic that acknowledges the integration of the normative character of a social convention with specific empirical behavior. This dialectic, first generates rules of procedural validity (what Hart called secondary rules) and then, rules of substantive obligation (what Hart called primary rules).

Since social convention is the result of human interaction, normative obligation to it is produced by those *effective* actions that create and protect society and, therefore, the absolute presupposition of social stability. Transcending the positivist dichotomy between normative and positive,

48 Loeb, Stability, Ch.1.

49 There is no passion, therefore, capable of controlling the interested affections but the very affection itself, by an alteration of its direction… Hume, Treatise, 492.

50 Hume, Treatise, 490.

51 The treaties of Westphalia established this axiom.

52 Charter of the United Nations, Art.2(7).

53 This stricture does not hold for "uncivilized" nations, as the circumstances of justice and "society" itself, are not shared so neither are social conventions. Hume, Enquiries, 190-191.

54 That is the same thick sense of normativity as invoking moral obligation.

Hume's inherent dialectic is simultaneously *normative* because it is connected to a specific definition of *justice*, and both the result of, and motivation for, specifically sanctioned *empirical* behavior. The *observable* and the *motivational*, or the external and the internal aspects of social convention, and the resulting legal rules, are simultaneously present in this dialectic. Their synthesis is made evident, for international law, in the evolution of the process-norm of Justice-As-Sovereignty.

Unlike Hart's concept of law, which assumes custom has no inherent sense of justice or morality, Hume argues that social convention, even in its pre-legal stage, evolves the sanctions of justice before the advent of political society or codified law. The process-norm of sovereignty has status because of its public utility to a stable international order, and because, as Hume states, justice is "impossible without antecedent morality" which provides the content of Justice-As-Sovereignty.[55] This makes social utility and justice dialectic prerequisites, and integral components, of both substantive and procedural rules of law.

A third difference between Hart and Hume is that Hume's philosophical-policy identifies a core dialectic of process↮principle that is generic to the concept of law and foundational to the validity of all rules generated by practice. By synthesizing the validity of the law and its moral authority from a dialectic between, respectively, procedural and substantive rules, Hume's philosophical-policy avoids the problematic dichotomy between valid law and moral law, as law is simultaneously both (at least in terms of providing for social coordination). In effect, the relationship between Hart's primary and secondary rules is a creature of Hume's essential dialectic between process↮principle; rule validity is inherently part of this moral geography.

Within this essential dialectic, a rule deciphers a system of conventional practice that contains both passion↮reason, as well as process↮principle, but in synthesis snapshots that grant the dominant role to the former component of both dialectic pairs. This results in a concept of law where the dominance of *process* is fundamental and a system of procedural/process rules are primary. What Hart calls 'rules of recognition' are, for Hume, the first and primary product of pre-legal practice and social convention as formed around an emerging process-norm of justice. Hume's concept of law then makes substantive rules secondary, both in chronology and importance.

Hume's philosophical-policy grants validity an inherent normative character connected to the effectiveness/stability of social convention, as his argument maintains that the procedural rules of social convention create the proper definition of natural/essential law, or the process side of those inherent and *universal* assumptions about humanity and its social conditions that make the law necessary. Meanwhile, the rules that create substantive moral duty are *local* and address the particular circumstances of justice faced by each evolving legal system. These substantive rules yield to process-based convention and the specific normative sense of justice that is made manifest in the particular process-norm that stabilizes property. This also defines Hume's idea of justice-as-convention, which, in turn, is the basis for future governance institutions.

Hume's philosophical-policy seeks universality in procedural *process*-norms, like Justice-As-Sovereignty which are also rules of validity, that invoke obligation to the coordination equilibrium that it protects. Rather than a dependence on substantively moral or principled duties, that are the primary source of morality for Hart, Hume's philosophical-policy makes such substantive ends secondary and dependent on the prior evolution of a legitimate procedural, legal system. Process-norms create stable cooperation and maintain it over time as society becomes more complex, without the involvement of any specific universal (substantive or independent) normative end, except that of the legitimacy or *validity* of collective action itself.[56]

Hume's moral dialectic is not about substantive duty, but the duty or obligation one has to the maintenance of a cooperative system of norms and rules. The normative point of departure for Hume's philosophical logic are the procedural rules that make convention valid by stabilizing the allocation of property, and therefore, society, which is the absolute presupposition of his concept of law. By facilitating the persistence of society and the passions behind it, the dialectic of procedural↮substantive rules makes the former universal, while it bends the substance of the law to the local requirements and specific contexts of the circumstances of justice.

From the standpoint of Hume's philosophical-policy, Hart's model does not adequately emphasize the interactive and dynamic role of philosophical norms as the progenitors of legal rules. For Hume, two sources of normative value overlap two layers of evolving law. First, he identifies social convention as related to universally valid process. Second, principle is related to local substantive rules of behavior. Both have a normative character with different content and level of application (process↮principle), where the latter is

55 Hume, Treatise, Bk3:6

56 Which is now but a boundary condition of process.

"slave"[57] to the former.

Hume's philosophical-policy defines the international legal system as a fundamentally justice-based system with a process-norm of Justice-As-Sovereignty, and a rule of recognition in the effectiveness of justice, making Hart's "primary" rules "secondary", in that they lack core status within the Humean model. In this way, Hume's concept of law creates a richer multi-tiered philosophical space with evolving institutional governance structures at both local and universal levels that can apply sanctions through contract-by-convention to integrate policy argument and legal design as these effectively support the end of the cooperative process itself.

Hume's comprehensive policy argument for his concept of law, directs us to focus on the process-rules of recognition, adjudication, and change, as the metaphysical essence of the fundamental process-norm of Justice-As-Sovereignty. But how about Hart's primary or substantive rules? How does Hume's concept of law handle them?

§§

Before the advent of contract-by-convention and the political society it ushers in, the evolution of social convention illustrates an effort to produce that pattern of practice, based upon Justice-As-Sovereignty, that assures social coordination and the persistence of international order. In Hume's concept of law, substantive rules and their deontic ends are not the focus of the social system. What is paramount are those procedural practices that establish and maintain cooperation through convention and assign valid roles to those who decide the ends of the society and the application of social convention to public affairs. Within the logic of Hume's philosophical-policy and legal design, process historically precedes substantive rules within all evolving legal systems, as substantive duty-imposing rules are, initially at least, created for their support of procedural social convention.

The Humean argument posits that process and rules of normative validity are the first, conventional elements bestowing certainty and universality on any informal substantive rules of behavior.[58] The conventional pattern of practice, which is first sanctioned by approbation and justice and then by the advent of political society and contract-by-convention, establishes a pattern of effective behavior coalescing on a point of equilibrium necessary for the stability of the society. These existing pre-legal practices are therefore the prime candidates for codification as legal rules with the advent of design institutions and the creation of positive law. With the establishment of governance institutions, within Hume's logic of concepts, the primary focus is on the elevation of procedural rules from practice to codified law.

When men have once perceiv'd the necessity of government to maintain peace, and execute justice, they wou'd naturally assemble together, wou'd chuse magistrates, determine their power, and promise them obedience.[59]

In his methodical separation of law and morals, Hart fails to integrate this dynamic tension between practice↯rules. He also fails to recognize the simultaneous presence, in the generation of the latter from the former, of the dialectics of both the normative↯positive and external↯internal aspects that Hume's concept of law proffers. Hart, unlike Hume, does not distinguish the prerequisite dialectic between *process-norms* that create "secondary" rules of recognition, adjudication, and change, and *critical-aetiological-norms* that are the source of the reasons and prior ends that inform the commands of "primary" duty-imposing rules or rights.

This discrepancy makes another more evident. Hart assumes only one type of primary or substantive rules within a legal system. But Hume's approach to the concept of law demonstrates that this is a more complex question than Hart allows. With two normative routes to the law, one through process and the other through critical principle, (*process*↯*principle*) and with the former initially dominating the latter but then allowing for a richer sense of critical substance with the advent of contract-by-convention and formal legal institutions to process them, Hume's philosophical-policy exposes the need for two distinct definitions of a substantive rule as international law evolves.

For Hume's idea of legal design, the evolution of law is initially a conventional process that creates governance structures through contract-by-convention, which allows policy argument a full set of political-legal institutions. The fundamental dialectic of the law, that between process↯principle, is then enabled to fully engage its components as the institutions of the political society that come from social convention have the capacity to process both procedural and substantive norms↯rules for law-in-society. The core dialectic can now be more completely utilized by legal design, with both passion and reason fully interacting with one another as a basis for argument and institutional codification. Passion-based *process* and reason-based *critical principle* can now both seek validity as dispositive law.

57 Hume, Treatise, 415.

58 The King has the a priori benefit of expectations, based on practices of recognition, adjudication, and change. These validate substantive contextual principles of behavior before any specific legal rules of criminality emerge, that, for example, might define murder independent of context.

59 Hume, Treatise, 132.

But even before the advent of contract-by-convention, there is still a need for informal pre-legal rules on substantive issues. But under these conditions, the substantive as well as the procedural rules are determined by the context of social convention; that is, by the process-norm of Justice-As-Sovereignty as the groundwork of the international legal system. While this is to be expected for procedural rules, as they are inherently means-based like social convention itself, it is unusual for substantive rules, given the basic understanding of the idea of principle as critical of convention and related to *ends* not *means*. Here, the word 'principle' must be bifurcated by policy argument into the two functional definitions required by Hume's concept of law: *contextual* and *critical*.

Normally, we think of a substantive 'principle' as a precept focused on an end rather than any particular means, and as having a critical or *a priori* source that is inherent within the principle itself and backed by human practical reason.[60] Given this definition of principle, Hume contrasts reason and the passions, and his philosophical-policy renders the distinction between *process-norms* and *aetiological-norms*, the latter containing a self-referential core with an inherent 'reason' or 'cause'. This definition of critical principle, as a "slave" of passion and process, has no significant status, for Hume, before the advent of contract-by-convention, because there has been no opportunity for critical principle to formally influence social convention on equal terms in the codification of legal rules. Nonetheless, any system of social convention has 'principles', which are necessary to what Hart calls 'primary' rules.

Before critical principle arises from *aetiological-norms*, the principles that exist within Hume's concept of law are established standards without independent foundation. They are determined by the requirements of Justice-As-Sovereignty and exist to maintain the cooperative process that social convention supports. Substantive rules at this stage of evolution find their meaning in the specific moral duties necessary to the persistence of social convention and its process-norm. Therefore, the functional definition of 'principle' is not critical but *contextual*; that is, not focused on an independent substantive end but dependent on a circumstantial end necessary to the persistence of social convention and the cooperative process established by Justice-As-Sovereignty.

Consequently, for international law, both procedural and substantive rules are initially derived from Justice-As-Sovereignty. For example, when self-defense is interpreted by the United Nations as a valid idea only for states,[61] it is a 'principle' *contextual* to Justice-As-Sovereignty. If self-defense were considered a critical principle it would make it dependent on a foundation independent of context and based in human reason, and the rights of the individual, or any agent, to defend themselves.[62] Only with the rise of critical principle, enabled by institutionalization under contract-by-convention, do aetiological-norms and their rules take on an internal *cause* and become independent of the conventional system of process and obligation that has been created solely to protect stable coordination.

With government, substantive principle can have a critical or independent status within institutions that they do not have in a society dominated by social convention. But when substantive ends are no longer exclusively based on the context of social convention or the process of cooperation as an end-in-itself, their aetiological manifestations, and the rules they prescribe, can act as critical standards on which to judge the legal status of the preexisting conventional norms and rules (both procedural and substantive). For example, when the substantial ends of international jurisdiction are no longer predominantly contained within the context of state sovereignty (i.e. territory and nationality), the fuller operationalization of universal jurisdiction, as the aetiological manifestation of the universal responsibility to enforce international law, could act as the critical principle for the judgment of all jurisdictional claims.

This creates a more balanced dialectic between substantive and procedural rules where their tension is more complete and fully engaged. With aetiological or critical rules generating legal obligation, the scale of forms for the process↹principle dialectic becomes much more complex and more fully operationalized. It is now possible to critically judge those conventions that truly support the substantive, principled ends of social or individual value, as opposed to those that do not. With critical principle as a full participant in the application of practical reason, a legal system produces rules (both procedural and substantive) that both reinforce and challenge social convention. Legal practice can now accommodate both the process rules of recognition, adjudication, and change, and their contextual principles as well as critical principles that can assess both as to their proper role within the positive law.

Within Hume's model of the concept of law, international legal practice is not, as Hart argues, a system of primary rules

60 Berman, Revolution, 8, for a definition of meta-law; Majone, Evidence, 146-149, for the concept of meta-policy, both involving self-referential principles.

61 UN Charter, Art. 51.

62 These two ideas of self-defense clash in the Nicaragua Case, where the Nicaraguan government pleads the principle as contextual while the U.S. argues for its status as a critical principle. See, 1986 I.C.J. 14 and Gillroy, Evolutionary Paradigm, 194-201.

without secondary rules, but a system of stable procedural or secondary rules, formed around Justice-As-Sovereignty, that produces contextual principles to stabilize the international system. All rules arise from social convention which also determines that set of contextual substantive principles necessary to the persistence of international society, even before the full interaction of process↯principle creates a more completely fleshed-out international legal system.

This important switch in pride-of-place, making procedural rules from social convention 'primary', changes our conception of international law to include multiple paths of dispute resolution and complex governance structures. Its institutions and sources of law may be distinct from those usually seen in municipal systems, but they contain both procedural rules and contextual substantive principles that make international law a legal system in its own right. Specifically, treating international law as a system of social convention that is formalized into codified law takes note of the foundations of law in sovereignty and its contextual principles. In addition, the relevance of the distinct category of critical principles in human rights, humanitarian and environmental regulations has the potential to become more prominent as the full process↯principle dialectic becomes more fully engaged.

International law is, therefore, not just a moral system, but a fully intact and evolving legal system just at the point where contract-by-convention, and its resultant governance structures, are becoming stronger and more three-dimensional. International law is a system of conventional procedural rules (e.g. *in dubio mitius*) and contextual substantive rules (e.g. *pacta sunt servanda*), recently faced with challenges from critical aetiological-norms (e.g. *jus cogens* principles and *erga omnes* obligations). The use of Hume's philosophical-policy in legal design offers the potential for a new perspective on sovereignty in international law that has profound implications for how we understand the global evolution of practice and the rule of law given the future path of its inherent dialectics.

For example, Hume's approach allows us to explain the legal status of "general principles of law recognized by civilized nations" as a source of international law.[63] These principles are not custom, nor are they *a priori* critical principles based on practical reason, like human dignity or environmental integrity, but have their foundation in the informal evolution of social convention, and are contextual to 'civilized' social rules supporting the process-norm of Justice-As-Sovereignty and the international society it renders. The human need for these principles to substantively support the procedural rules of the status-quo in the form of Justice-As-Sovereignty gives these contextual principles their utility and their status in a definition of justice and as a source of law.

As contract-by-convention on the international level provides increasingly complex governance (i.e. sanctioning) structures, through which a more balanced idea of practical reason can find expression in the legal design process, concern for universal human rights, the integrity of nature or universal jurisdiction as critical substantive ends should play a larger role in the international rule of law. Current dilemmas, such as the legalization of universal jurisdiction or humanitarian intervention, may demonstrate that this administrative or political institutionalization is underway. Within Hume's concept of law, these dilemmas are created by the rise of critical, aetiological, or universal principle, escalating the dialectic between process↯principle and challenging the dominant status of conventional practice (i.e. Justice-As-Sovereignty and its contextual principles).

But even with a fuller engagement of process↯principle, critical principles should be expected to remain secondary to passion-induced process-norms because a considerable amount of time and persuasive argument will be necessary to erode the bulwark of established social conventions and their contextual principles. This is because, within Hume's philosophical-policy, critical principles based on inherent ends are independent of process, so their ends are assumed to challenge the status of the core process-norm of Justice-As-Sovereignty. As a result, critical principles, will be unconsciously assumed to be disruptive to the established-fundamental coordination equilibrium. Thus they are devalued within the international governance system to the advantage of conventional process-norms like Justice-As-Sovereignty.[64] In terms of international legal practice, this may account for the longevity of the definition of sovereignty created by the 1927 PCIJ decision in *Lotus* and the 1928 *Isle of Palmas* arbitration, which in recognizing a rule of recognition for international law, are still perceived to be essential to stable international collective action.

§§

Another important distinction of Hume's concept of law, as opposed to Hart's, is that his argument for rules of recognition does not exist distinct from, but grows immersed within, his definition of justice. It is in the evolution and moral/legal status of Justice-As-Sovereignty that we find, in fact, two such rules emerging.

As social convention, rather than mere custom, Justice-As-Sovereignty is endowed with two specific characteristics. First, social convention implies 'effectiveness'. To evolve over its scale of forms, the process-norm for a system of social

63 International Court of Justice Statute, Art. 38(c).

64 This may be the origin of the dismissive categorization of "soft law".

convention must be an effective means to achieve stable social coordination. Next, sovereignty as social convention focuses, primarily, on procedural means to establish an effective point of coordination or equilibrium. Although social convention may require certain substantive rules to provide for the ends of coordination, these instrumental principles will never be independent moral standards but context-driven principles, dependent upon the procedural nature of justice-as-convention for their character. For Hume, *effectiveness* is both the standard of validity and the source of moral obligation for Justice-As-Sovereignty.

So Hume's worldview assumes that process-norms for justice are the test for two manifestations of normative-empirical validity. They first create, and then stabilize, the sovereign state as an institutional manifestation of municipal-level society. Justice-As-Sovereignty, in its role as a process-norm, then simultaneously assures international stability and local validity as it protects and empowers each nation in its relationships with other sovereign states. Overall, Justice-As-Sovereignty has utility as a process-norm because it creates a stable and therefore legitimate state within a stable and therefore legitimate international order.

Therefore, a full metaphysical understanding of Justice-As-Sovereignty requires the identification of two interrelated *rules of recognition*: one *local* and dealing with the 'effectiveness' of the sovereign state from its internal social perspective; and the other *universal*, and dealing with the external affects of sovereignty in the establishment of legitimate reciprocal cooperation and the security of international society.[65] This additional 'universal' rule of recognition will be a dialectic partner with effectiveness and recognize the validity of international law in terms of inter-state obligation within an international society. But its examination must await another venue.

For our purposes, it is Hume's primary focus on 'effectiveness' as the 'local' rule of recognition for Justice-As-Sovereignty that is of interest. Effectiveness, as a local rule of recognition, is the conventionally dominant component of those dialectics that create Justice-As-Sovereignty as an expression of practical reason. Hume's philosophical-policy builds the idea of rules of recognition on the foundation of local social convention and its scale of forms, and more particularly, the dialectic between local↹universal as this impels the law forward. Therefore, society, within the social construction of the state, requires a local rule of recognition that validates international law as those rules that honor Justice-As-Sovereignty in terms of the 'local' or internal stability of that municipal system within the greater system of states.

65 Gillroy, Evolutionary Paradigm, Chapters 2 & 4.

If the metaphysics of sovereignty gives synthetic priority to the municipal stabilization of property, then this will affect where the burden of proof is placed by international legal practice. Specifically, the burden will be placed, not on the local level of recognition to demonstrate that international law permits a particular act, but on the universal level to demonstrate that it prohibits a particular act so as to maintain the stability of the equilibrium established by Justice-As-Sovereignty. This dialectic balance toward the priority of local effectiveness supports an international law created as a system of specific and limited prohibitions.

This particular definition of the burden of proof was precisely that established in 1927 by the Permanent Court of International Justice in the *Lotus* Case.[66] Within this case, substantially about criminal jurisdiction on the high seas, the court recognized the minimum parameters of international legal practice as if they were an evolving set of social conventions existing to protect the effectiveness and local stability of municipal systems cooperating internationally on the basis of Justice-As-Sovereignty.

…all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[67]

If international law is evolving so that sovereign municipal conventions can maintain effectiveness, stabilized and protected from international disturbances, then it makes sense to have a rule of recognition based on a system of prohibitions, so that municipal societies are only regulated (recognizing valid international law) when their actions threaten the fundamental stability of the international level of social organization. Otherwise, a level of international legal agency endangering Justice-As-Sovereignty could result. Intrusive international regulation would threaten the effectiveness of the stable equilibrium established by the process-norm of Justice-As-Sovereignty. Law should not inhibit social convention, which has already demonstrated its effectiveness in maintaining order within a state-based governance structure and therefore has attained pride of place in legal practice.[68]

... international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will… established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot

66 Lotus, P.C.I.J. Ser.A, No.10, p.4 (1927).

67 Lotus, 19.

68 Gillroy, Justice & Nature, Ch.4.

therefore be presumed.[69]

From the vantage point of Hume's concept of law, the equilibrium of coordination is such that only a prohibition-based system of international law is reasonable.[70] Law at the international level is required only to prohibit such state action as threatens Justice-As-Sovereignty. Consequently, *Lotus*, as a point of departure, gives priority to the local rule of recognition and creates a system of international law on the back of those established social conventions. *Lotus* grants primary legal status to municipal government, and its contract-by-convention, that has stabilized each of the states to make up the international order. This also creates a narrow field for universal recognition of an international jurisprudence, which has the burden of proof to find a specific prohibition to extend transnational jurisdiction.[71]

[t]he Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case... [72]

But setting this burden of proof is only the first step in the legal scale of forms as defined by the rules of recognition within Hume's philosophical-policy. Once social convention establishes the contextual liberty of each state in the law, it then needs further refinement of the process-norm of Justice-As-Sovereignty, so that the idea of effectiveness gains finer definition in legal practice.

This next step in the conceptual refinement of Justice-As-Sovereignty on a Humean scale of forms can be found in the 1928 *Isle of Palmas* arbitration.[73] Here, the burden of proof for local recognition was further defined by the idea of the *effective control of territory*. The first task of Justice-As-Sovereignty is to make sure that local effectiveness is protected in the most basic legal terms. Hume defines justice as the stabilization of property, so a rule of recognition based upon social convention would primarily seek a material definition of the state by focusing on the empirical 'effectiveness' of its local social conventions in the stability of its territory.

Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. … the development of international law, [has] established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions…[74]

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority…therefore holds good.[75]

Moreover, the legal evidence of the United States[76] for control of the island was trumped by the long-term effective control of the territory by the Netherlands. The law recognized social convention and practice as much more important than positive law; in fact, the evolution of practice is what creates the basis for valid codified rules within Hume's concept of law. Therefore, it should not be surprising that an international legal practice arising from social convention continues to use the material conditions of 'effective control' to judge the legal status not only of territory, but of the legitimate parameters of international law itself.[77]

§§

The inherent complexity of Hume's concept of law offers a more expansive normative foundation for policy argument and international legal design than Hart's more acclaimed rendition. Within Hume's philosophical-policy, the priority of social convention, its process-norm of Justice-As-Sovereignty, and effectiveness as a local rule of recognition, create the background conditions necessary to the stability and order of international law. Only through contract-by-convention and its process-based normative foundation does the possibility of formal law become real. But the legal universality and certainty provided by the preexisting social convention allow for the full inclusion of critical, substantive, and procedural norms, rights and rules in transnational policy and legal design.

One result of applying Hume's logic of concepts to the normative geography of international law is that we can make distinctions, not fully articulated within contemporary international law, between at least three types of 'norms,' all of which are present in the international legal system. It is possible to distinguish a reasoned critical principle

69 Lotus, 18.

70 At least initially.

71 This predisposition is demonstrated by the ICJ in its Advisory Opinion On The Use of Nuclear Weapons. See, Gillroy, "Practical Reason and Authority Beyond The State" in Legal Authority Beyond The State. (CUP, 2018) pp.127-160.

72 Lotus, 21.

73 (1928) II RIAA 829.

74 Lotus, 1.

75 (1928) II RIAA 3.

76 In both treaty and custom.

77 While still predominantly true, critical principle sometimes makes this standard problematic; as when humanitarian law denies effective control in order to make occupation illegal while depending on it to enforce the responsibility of states within the Geneva Conventions.

or *a priori* end from a passion-based process-norm or a formal rule based upon its sovereign authority. The positive law is now a dialectic lattice-work of all of these 'norms'. Each appears as a distinct, yet interrelated, component of Hume's concept of law. Each type of norm plays a distinct role as international society becomes more complex and convention becomes more ingrained in the legal system, first by approbation, then by justice, and finally by governance institutions under contract-by-convention. In making these normative distinctions, however, Hume's philosophical-policy also creates a hierarchy or scale of forms through which law is codified.

The importance of an *a priori* principle, which is the traditional starting point of, for example, a natural law argument, is made posterior and secondary to the prior evolution of convention from human social interaction. Passion is deemed more fundamental than reason and is much more critical to establishing a stable society. Our "passion" for society is the "natural" driving force for the metaphysics of Hume's philosophical-policy; the rendering of Justice-As-Sovereignty as a manifestation of the passion for society is the basis for contract-by-convention, governance institutions, legal design, and the codified rules of the international positive law.

Anticipating Kelsen[78], Hume makes his concept of law simultaneously empirical, sociological, and constructivist in nature. But unlike either Kelsen or Hart, Hume's philosophical-policy maintains the interdependence of normative and positive as dialectic elements of the evolution of law. As humans seek order at the international level, Justice-As-Sovereignty is adopted as the core standard or process-norm to gauge the utility of positive rules as they support or disrupt collective action within the developing legal system. Hume's conceptual logic creates a more universal level of social order in which the normative metaphysics of Justice-As-Sovereignty is *integrated* into positive practice creating stability for international property. Order becomes the natural means of justice—a means that is at the same time an inherent end-in-itself for Hume's concept of law. Henry Sidgwick described Hume's definition of justice in just this way.

> What Hume means by Justice is rather what I should call Order, understood in its widest sense: the observance of the actual system of rules, whether strictly legal or customary, which bind together the different members of any society into an organic whole, checking malevolent or otherwise injurious impulses, distributing the different objects of men's clashing desires, and exacting such positive services, customary or contractual, as are commonly recognized as matters of debt.[79]

For this reason, Hume's idea of 'sovereignty' does not have the status of a reasoned *a priori* principle. Rather it is a process-norm of justice that protects social cooperation through *effectiveness* as a rule of recognition by which sovereignty is created and through which its validity persists. The moral value or validity of a process-norm of justice is in its capacity to maintain the cooperative process. And while it arises before government and contract-by-convention exists, a process-norm eventually, with the size and complexity of the society it orders, faces more complex challenges and responds to them through law.[80]

Hume's concept of law is not defined by a particular rule or set of rules, nor the legal principle from which they may have arisen, but, rather, by the system of practice in which property stabilization through coordination is embedded. The *effectiveness* with which the process-norm of Justice-As-Sovereignty provides for this universality, certainty, and consequent stability of international society grants it validity or legitimate authority within the system. This role also grants Justice-As-Sovereignty its moral authority. *Effectiveness,* as effective control of territory, becomes the local rule of recognition for the process-norm of sovereignty that invokes the obligation to maintain it as if the entire stability of the international legal system depended on it.[81]

In terms of the future evolution of the international legal system, Justice-As-Sovereignty will inhibit any law to the degree it does not effectively represent the system's coordination conventions and their persistence.[82] Critical principle is inherently disruptive to process and so we might expect that, at least initially, the idea of principle, as a recognized source of international positive law and practice, will be primarily *contextual* rather than *critical*. Any presence of critical principle in contemporary international law will likely be considered, by those entrusted with the persistence of the legal system, as inherently destabilizing and a threat to order that should be distrusted and "[c]hased from the

78 Kelsen, Pure Theory of Law.

79 Sidgwick, Methods, 440.

80 For example, Justice-As-Sovereignty is a 'process-norm' necessary to international social convention, at least at its origin, but can be overtaken if and when it no longer is effective in maintaining coordination. Especially after the advent of contract-by-convention, other process-norms (e.g. Trade-As-Reciprocity) may contest its status, as can a priori regulative or critical principles (jus cogens) that originate within legal and policy design institutions. Both of these possibilities challenge the order and stability of the international equilibrium, but to different degrees.

81 Cassese, International Law, 12-13 and Ch.3.

82 Hume's concept of law fundamentally establishes the process-norm of Justice-As-Sovereignty as both the "is" and "ought" of social coordination for international law.

open country"[83] by social convention and its local rule of recognition. To the degree this remains true, reason and its critical principles shall remain the "slave of the passions" and face a slow, if not completely stalled, process of codification.

83 Hume, Essays, "On the Different Species of Philosophy".