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BOGIŠIĆ AND 'ANCIENT LAW'

1. INTRODUCTION — 'FROM STATUS TO CONTRACT'

I shall begin this paper by quoting a famous passage from *Ancient Law* which Sir Henry James Sumner Maine published in 1861.

'The movement of the progressive societies has been *uniform* in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. *The Individual is steadily substituted for the Family*, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign sources. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the *Family*. *It is Contract*. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of *Family*, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In *Western Europe* the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared — it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than

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her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. Soo too the status of Son under Power has no true place in law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives it legal validity. The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, they are wanting in the first essential of an engagement by Contract.

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, *we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.'*(1)

The passage above contains a well-known manifestation of 'Historical Jurisprudence', which is 'from Status to Contract'. It is apparent that the basic framework of Historical Jurisprudence is based on the idea of the uniformity of the way of progress in societies; mankind appears different but the difference is no more than the degree of the progress and the direction of the progress is linear. (2)

In the passage above it is not difficult that the term 'Status' means the position in the Family such as Slave, Female and Son etc., and the term 'Contract' means the free agreement of Individuals. In short 'from Status to Contract' does mean 'from Family to Individual'.

In this framework Maine analyses Greek, Roman, Hindoo, medieval and modern continental laws as well as Common Law. When he assesses the degree of progress in law, he refers to codification, 'fiction' as a legal technique, natural law and equity. Then, he examines those laws in each branch of the law such as succession, property, contract and delict and crime. However,

he draws heavily on sources of Roman law for his discussion. Very occasionally he refers to other sources than those of Roman law.

Indeed, the predominance of Roman law in comparative studies, or any kind of legal studies, is in a sense inevitable particularly in mid-19th Century. However, it is obscure when and where Maine (1822–88) had studied Roman law when he was appointed to the Regius Professorship of Civil Law at Cambridge in 1847 at the age of 25. Maine read Classics at Pembroke College Cambridge (1840–3) and shortly after that, he accepted a tutorship at Trinity Hall but did not or could not take up the fellowship which is usually associated with the tutorship. Rather he became Regius Professor of Civil Law in 1847 at Cambridge. Burrow assumes that 'probably no more was involved than the superior attractiveness of the law'. (3)

Maine joined the Bar in 1847 and became Reader in Roman Law at the Council of Legal Education of the Inns of Court in 1852. In his first essay on Roman Law and Legal Education published in 1856, Maine admits the importance of the study of Roman law for legal Education. Stein draws our attention to the subtitle of Ancient Law, 'its connection of the early history of society and its relation to modern ideas'. Stein argues that 'It was an attempt to expound the historical development of the legal conceptions which were incorporated into the social system of his own time, such as property, disposition by will, contract, crime and punishment.'(4)

This is a mixed and somewhat obscure academic background to Maine's Ancient Law. His academic interests started from Classics and Comparative Philology and then expanded into Law. But both did not go beyond the Indo-European, or Aryan limitation. (5)

The purpose of the following paper is twofold; firstly, to (re)evaluate some works of Baltazar Bogišić (1834–1908) and Nobushige Hozumi (1855–1926) in the context of Historical Jurisprudence established by Maine. Secondly and the other way around, to (re)evaluate Historical Jurisprudence in a broadened aspect by including works of Bogišić and Hozumi. In the University of Oxford in 1872, the combined school of Law and Modern History was separated and 'Jurisrudence' was expected to become an independent single discipline. It is around this time that the Corpus Professor of Jurisprudence was newly established in 1869, and other professor/readerships such as Vinerian Readership in English Law and Chichele Chair were created. Eminent scholars were attracted to those professorships, one of whom was Maine. (6)

The Corpus professorships have been succeeded by Henry Sumner Maine (1869–77), Frederick Pollock (1883–1903), Paul Vinogradoff (1903–1925),

Walter Ashburner (1926–1929), Carleton Allen (1929–1931), Arthur Lehman Goodhart (1931–1951), H. L. A. Hart (1952–1968),

Ronald Dworkin (1969–1998), John Gardner (2000–2016), Ruth Chang (2019-). It is not difficult to discern a gap between 'until Vinogradoff' and 'after Goodhart', to which I shall return later.

2. BOGIŠIĆ AND HOUSE COMMUNITY

In *Ancient Law* it is not easy to find the passages in which Maine mentions something about 'Slavic/Slavonic', but not impossible. For example,

'Whether we look to the Greek states, or to Rome, or to the Teutonic aristocracies in Ditmarsh which furnished Niebuhr with so many valuable illustrations, or to the Celtic clan associations, or *to that strange social organization of S(c)lavonic Russians and Poles which has only recently attracted notice*, everywhere we discover traces of passages in their history when men of alien descent were admitted to, and amalgamated with, the original brotherhood'. (7)

'The earliest modern writers on jurisprudence remark that it was only the fiercer and ruder of the conquerors of the empire, and notably the nations of *S(c)lavonic* origin, which exhibited a Patria Potestas at all resembling that which was described in the Pandects and the Code.' (8)

'The researchers of *M. de Haxthausen, M. Tengoborski*, and others, have shown us that the Russian villages are not fortuitous assemblages of men, nor are they unions founded on contract; they are naturally organized communities like those of India. It is true that these villages are always in theory the patrimony of some noble proprietor, and the peasants have within historical times been converted into the predial, and to a great extent into the personal, serfs of the seignior. But the pressure of this superior ownership has never crushed the ancient organization of the village, and it is probable that the enactment of the Czar of Russia, who is supposed to have introduced serfdom, was really intended to prevent the peasants from abandoning that co-operation without which the old social order could not long be maintained. In the assumption of an agnatic connection between the villagers, in the blending of personal rights with privileges of ownership, and in a variety of spontaneous provisions for internal administration, the Russian Village appears to be a nearly exact repetition of the Indian Communities; but there is one important difference which we note with the greatest interest. The co-owners of an Indian village, though their property is blended, have their rights distinct, and this separation of rights is completed and continues indefinitely. The severance of rights is also theoretically complete in a Russian village, but there is only temporary. After

the expiration of a given, but not in all cases of the same, period, separate ownerships are extinguished, and the land of the village is thrown into a mass, and then it is re-distributed among the families composing the community, according to their number. This repartition having been effected, the rights of the families and of individuals are again allowed to branch out into various lines, which they continue to follow till another period of division comes around. An even more curious variation from this type of ownership occurs in some of those countries which long formed a debatable land between the Turkish empire and the possessions of the House of Austria. In *Servia*, in *Croatia*, and the Austrian *Sclavonia*, the villages are also brotherhoods of persons who are at once co-owners and kinsmen; but there the internal arrangements of the community differ from those adverted to in the last two examples. The substance of the common property is in this case neither divided in practice nor in theory as divisible, but the entire land is cultivated by the combined labour of all the villagers, and the produce is annually distributed among the households, sometimes according to their supposed wants, sometimes according to rules which give to particular persons a fixed share of the usufruct. All these practices are traced by the jurists of the East of Europe to a principle which is asserted to be found in the earliest *Sclavonian* laws, the principle that the property of families cannot be divided for a perpetuity. (9)

It is apparent that in the passages quoted above, Maine had already been informed about the Slavic (Slavonic) law through the works of M. de Haxthausen, M. Tengoborski and others. As Cepuro(2010) has pointed out that Bogišić made contacts with three successive Corpus Professor of Jurisprudence, namely Henry Sumner Maine (1869–1883), Frederic Pollock (1883–1903), and Paul Vinogradoff (1903–1925). Maine's article, 'South Slavonians and Rajpoots' appeared in the journal, 'The Nineteenth Century' in 1877. In this article Maine employed a method of comparative study between Slavonic law and Indian Law, focusing on South Slavonic house communities and institutions of Indian 'Rajpoots'. Maine's argument on Rajpoots is based on the work of Sir Alfred Comyn Lyall (1835–1911), a British civil servant of India. (10)

Maine's argument on Slavonic law is based on the German article which contains the Bogišić's studies of the communal joint family and the work of Fedor Demelic. (11) The latter again is based on Bogišić's work. Therefore, Maine had some acquaintance about Bogišić's academic works, but not from Bogišić's original ones, because Maine was not able to read Slavic languages. Maine assumed that the Islamic domination in South Slavonian communities had brought about the effect of preserving their barbarism, and thought

that their law and custom on the House Communities could be comparable with the institutions of Rajpoots, as reproductions of 'ancient law'.

On the part of Bogišić, in summer 1880 he spent six weeks in London for the study of Common law for the preparation of the Montenegrin Code of Property. Most probably, Bogišić attempted to meet Maine but in vein, because Maine was on holidays in Belgium at that time. Soon later Maine send a letter of apology to Bogišić and then they exchanged letters a couple of times though they neither met nor discussed each other directly. But through the exchanged letters it becomes visible that Maine was eager to know whether or not the South Slavonian family and Roman family, the position and power of father in particular, are similar to each other. Bogišić's answer was that the paternal power of South Slavs was less markedly pronounced than Maine expected.

Maine concluded this exchange of letters with the hypothesis that in most ancient societies the paternal power was less strict than was commonly assumed and its strictness among Romans and Hindus stemmed from its having been defined by the law pronounced at a very early time when it encompassed some other characteristics as well. It should also be noted that they never discussed problems in the codification. This looks rather strange because the purpose of Maine's historical and comparative jurisprudence is 'regislation' and Bogišić's survey of local customs was indeed a preparation for the legislation of the Montenegrin Code of Property. (12)

Maine's interest and knowledge of East European house communities, which was strengthened by the exchange of letters with Bogišić, becomes more apparent in his later work, *Early Law and Custom*, published in 1883, in particular, the Chapter VIII, South European House Communities. (13)

Maine says as follows;

'Fifteen or twenty years ago the institutions of the Slavonians had begun to attract attention, and it was becoming extremely probable that they would prove to be the bridge connecting two portions of the earth and mankind long arbitrarily separated, the East and the West. The Russian Village Communities were seen to be the Indian Villages Communities, if anything in a more archaic condition than the eastern cultivating group. In the Village Community, however, the bond of common origin and kinship, though still recognized in language and to some extent in feeling, is feeble and indistinct; the model has been too often simulated by fictions for the sense of reality to be very strong. The related families no longer hold their land as an indistinguishable common fund- they have portioned it out, at most they redistribute it periodically; sometimes even that stage has been passed. They are on the high road to modern laned proprietorship. But in

the Joint Family of the Hindus the agnatic group of the Romans absolutely survives- or rather, but for the English law and English courts, it would survive. Here there is a real, thoroughly ascertained common ancestor, a genuine consanguinity, a common fund of property, a common dwelling. And *the Joint Family of the Hindus, save that it now lasts for fewer generations, is point for point the House Community of the South Slovonians*. The distribution of these ancient groups in the countries in which they are found is well worth remarking. The North Slavonians or Russians have the Village Community. *The House Community belongs specially to the South Slavonians, the Croatians, Dalmatians, Montenegrians, Servians, and the now Slavonised Bulgarians.* On the other hand, in India, the Joint Family and the Village Community are often found side by side, sometimes indeed bound together by complex common relations. Even there, however, it ahs been observed that, where joint families are abundant, the village organization is weak and village communities are rae; and this is notably the case on Lower Bengal.

The House Community then is an extension of the Family: an association of several and even of many related families, living together substantially in a common dwelling or groups of dwellings, following a common occupation, and governed by a common chief. The law or custom which regulates these institutions has lately been subjected to a close examination by an eminent man of learning, whose writings are still obscured by that unfortunate veil of language which hides Slavonian literature from this generation of Englishmen. *The name of Professor Bogišić is connected with several places, with which, now of all times, we should least expect to have literary associations. He is a native of Ragusa; his last work is published by the Academy of Sciences at Agram; he is a professor in the University of Odessa; and he has codified the laws of Montenegro.* The results of his investigations are only known to me through some German translations of passages in them, and through a summary of a portion of them by M. Fédor Demelic. Nothing, in my opinion, can exceed their instructiveness. They show us the very way in which, amid a primitive tribal society of Aryan race, the personal relations and ideas of men become modified when the small groups of which they form part are absorbed in larger assemblages, both the large and the small group being respectively tied together by community of blood. They thus disclose to us Political Power in the embryo: the Chief growing out of the head of the household, the State taking its first beginnings from the Family. They are entitled to take their place by side of some recent Indian investigations which I will describe presently, as new materials of the highest value for a theory of the condition of the higher races of men in a state of barbarism.' (14)

In the above passage Maine explicitly mentions the name of Bogišić and acknowledges his works of Slavonic law and customs. It is very important that Maine characterizes the South Slavonic law as House Community and puts it in the same group as Joint Family in India, distinguishing it from the North Slavonic law or the Russian law. However, their intellectual exchange between Common law and Slavonic law did stop here because of the death of Maine in 1888. (15)

Further developments of the exchange could have been expected between Frederic Pollock(1845–1937), the successor to Maine's chair of Jurisprudence at Oxford (1883–1903), and Bigisic himself.

Cepuro argues as follows; Pollock sent Bogišić a copy of the review of Bigisic's work, *De la forme dite "Inokosma" de la famille rurale chez les Serbes et les Croates*, published in 1884 in Paris. The review was published in the newly launched journal, *The Law Quarterly Review* vol. 1 (1885), of which Pollock himself was Editor and also the author of this review. Pollock points out in the review that the inheritance, as it existed in the West and Roman law, was unknown to this community which was more similar to the joint family of Hindu Law. The purpose of Bigisic's study was meant to Pollock as a warning to rulers against errors of that kind which had, despite of their best intentions, been made by British legislators and settlement officers in India.

In particular Pollock paid his high regard to Bogišić's Montenegrin Code which, Pollock himself probably noted in *Law Quarterly Review*, was in some respects the most original modern code.

In contrast to the relationship between Maine and Bogišić, Pollock and Bogišić did meet each other a couple of times. Indeed, Bogišić stayed at Pollock's country house for several days in 1907. Indeed Pollock sent a mourning letter to Marija Bogišić-Pohl, Bogišić's sister, on Bogišić's death by saying that he was a good friend of Bogišić. However, despite of their personal and intimate relationship, Pollock's intellectual interest in Bogišić's works is rather practical and limited, namely, to what extent Bogišić's works including the Montenegrin Code can be useful in the legislation of India. Also Pollock's own interests became focused on Common law and its history rather than comparative jurisprudence like Maine. (16)

Lastly, I shall briefly look at the relationship between Bogišić and Paul Vinogradoff (1854–1925), the successor to the Pollock's Chair of Jurisprudence (1903–1925). Quite different from Maine and Pollock, Vinogradoff, a native Russian and educated in Moscow, is the scholar with both knowledge of Common law and Slavic law in its original language. Indeed he is the most qualified scholar who can understand the works of Bigisic.

Vinogradoff did publish a commentary on the Montenegrin Code and was among the few who expressed certain doubts about its adoption. His initial claim that the legislations of Slavonic countries broke with the tradition of customary law and that Montenegro which had preserved the oldest Slavonic institutions — as exemplified by laws such as those allowing for the blood feud and private wars and not representing a threat to the ancient popular law — was the only exception following the same line of reasoning. Vinogradoff believed that the best and most original feature of the Code was Bogišić's appreciation of the importance of customary law. But as Vinogradoff argues, a popular element was not present in any shape or form in the General Property Code which was compiled only by Bogišić and the (legal) experts. In this process of drafting the Code Vinogradoff found an essential contradiction between the theory and practice in terms of customary law although Bogišić carried out the full survey of customs in Slavonic regions. Indeed Vinogradoff acknowledged the Bigisic's policy of the separation between parts of Property and Obligation, and those of family law. However, He found elements of Roman law in the parts of possession and obligations.

In his later unfinished work, *Outline of Historical Jurisprudence*, vol. 1, Introduction and Tribal Law, Oxford 1920, Vinogradoff refers to Bogišić's work about Slavonic communal family. In particular, based on Bogišić's survey in South Slavonic lands, he touches on customs regulating community management and the role of father. However, Vinogradoff, oddly enough, only mentions "districts inhabited by the Serbian race". There can be found in Bogišić's Museum(Library) neither correspondence nor works of Vinogradoff. (17)

Cepuro concludes; for the three Professors of Jurisprudence Bogišić provided an exceptionally important source of the South Slavonic and, more generally, Slavonic laws. While it is possible to claim that it was Vinogradoff who best understood Bogišić's studies and legislative work, it was Maine who highlighted their value in the most significant way and in whose opus they occupy the most important place. (18)

3. HOZUMI AND ANCESTRAL-WORSHIP

After having been taught by a British lawyer, William Grigsby (1847–1899) who was Professor of Law at Tokyo Kaisei School, (the former Tokyo University), Nobushige Hozumi (1855–1926) studied law firstly in London (King's College and Middle Temple from 1876 to 1879) and qualified as Barrister (Middle Temple), then moved to Berlin to study German law from 1880 to 1881. Upon his return to Japan, in 1882 Hozumi was appointed to

Lecturer of Law, then in the next year, to Professor and Dean of the Faculty of Law at Tokyo University, which had been established in 1877 and reformed as the Imperial University in 1886.

Among his numerous contributions to the development of modern Japanese legal system and education, the two seem to be most important to this essay; the first is the codification. Along with Kenjiro Ume (1960–1910) and Masaakira Tomii (1958–1935), he is one of the three compilers of Japanese Civil Code of 1896–1898, which is the revised version of the first (Old) Civil Code of 1890, of which the parts of property and obligations are first drafted by the French Professor Gustav Emile Boissonarde de Fontarabe (1825–1910). (19) Hozumi is the only one who can contribute from the background of Common law because Ume studied in France and Germany and Tomii studied in France, while the Civil Code itself followed the 'Pandekten System' of Germany. He also much contributed to the introduction of the jury trial into Japanese criminal justice system. The law of jury trial, which came into force in 1928 and suspended in 1943 (and never reactivated), was one of the very few legislations which were brought forth under the influence of Common law.

Secondly, Hozumi's contribution to the legal education and science of law (Rechtswissenschaft) is also formidable. As Professor of Law at Tokyo University he taught mainly Roman law and Jurisprudence. This is exactly same as Maine's teaching. One may call him 'Maine in Japan'. Among his numerous publications the magnus opus is; *Treatises of the Evolution of Law*, of which only the first three books were published (in Japanese) in 1924–1927 though originally planned in 12 books (6 vols). This works was hoped by the author to be a monument of Historical Jurisprudence which Maine also aimed to establish. Hozumi published few monographs in English, one of which is, *Ancestor-Worship*, Maruya and Co., Tokyo, in 1901. Here I shall discuss the latter.

The book has two aims. The one is to introduce the foreign readers to the historical and religious backgrounds, both in general and in Japan in particular, to ancestor-worship, and the other is to explain the Japanese legal framework of ancestor-worship, in Japanese Civil Code in particular, to the foreign readers. Indeed, this book is based on a lecture at the International Conference held in Rome in 1899. Although this book does not contain any reference to Maine's works such as *Ancient Law and Early Law and Custom*, I should like to argue that this book can be compared with Maine's works.

In Part I, Ancestor-Worship in General, Hozumi argues as follows;

'The writers who attribute the origin of Ancestor-worship to "the dread of ghost" and to "ghost-propitiation" fail to discriminate between ghosts

which are to be *dreaded* and those which are to be *respected*. Ghosts can be divided into two separate classes, those that compel *fear* and those that inspire *love* and *respect*. The ghost of enemies or of those that have met an unnatural death belong to the former; and sacrifices are sometimes made to their spirits for the purpose of propitiating them. But the ghosts of ancestors belong to the latter class; and sacrifices are made to them, and their spirits are worshipped, as a result of love and respect which their descendants feel towards them. — — — The theory of the "dread of ghosts" and "ghost-propitiation" seem absolutely unnatural so far as the worship of ancestors is concerned; and, however strange the expression may sound to Wester ears, it would be more accurate to assert that it was the "Love of Ghost" which gave rise to the custom of Ancestor-worship.' (20)

Then Hozumi continues;

'The question whether Ancestor-worship is an *universal institution*, that is to say, whether all races if mankind have, at some time or another, passed, or must pass, through the stage of this worship, is one the solution of which cannot be lightly attempted. Personally, I cannot conceive how the human race could have arrived at this present state of social and political life without at first experiencing the influence of Ancestor-worship. *M. Fustel de couranges in his brilliant work "La Cité Antique"* asserts that the custom existed, at one time, both in Greece and in Rome, and the learned work of Dr. Hearn, entitled "The Aryan Household" shows that Aryans were an ancestor-worship race; while most of the recent investigations of historians and sociologists, as well as traveller's accounts of the manners and customs of primitive peoples prove that the worship of deceased ancestors is practised by a very large proportion of mankind. This seems to point to the conclusion that all races practise it in the infancy of their development, and that it was the first step towards the inauguration of social life on a wide basis.' (21)

It becomes obvious that Hozumi's argument is based on the Evolution Theory of Maine. Then Hozumi proceeds to Part II, Ancestor-Worship in Japan where he groups Ancestor-worship into three categories, namely, the worship of the First Imperial Ancestor by the people, the worship of the patron god of the locality, or the worship of clan-ancestors by clansmen, and the worship of the family-ancestors by the members of the household. (22)

Among legal frameworks of Ancestor-worship the family law in the Civil Code is most elaborated for the purpose of maintaining the worship of the family-ancestors. Hozumi says as follows,

'From what has been stated relative to the development of the law of registration, it will be seen that *Japan is now in a state of transition*. Until recently, a house was a corporation and a legal unit of the state. But ever since

the Restoration of 1868, the family system has gradually decayed, until, at present, the house has entirely lost its corporate character. Formerly, it was the head of the family only who could fill an official position, serve in the army, and hold property. But with the reform in the system of government, the members of a house were permitted to fill public positions and the reform of the law of military conscription, both head and members are liable to military duties; while with the progress of commerce and industry the younger members of house were entitled to hold public bonds, stocks and shares, which the law recognizes as their separate property. Although the house has thus lost its corporate existence in the eyes of the law, it still, nevertheless, maintains its character as the unit of society. The new Civil Code which came into operation in 1898, allows members to secede from a household and establish a new "branch-house" with the consent of the head of the family (Art. 743 Civil Code); *for the law recognises the tendency of social progress towards individualism, but at the same time, it makes careful provision for the continuity of the house. The house is the seat of Ancestor-worship*, and, therefore, the discontinuance of the house implies the discontinuance of worship. It is for that reason that the Civil Code contains many strict rules against the discontinuance of the house.'(23)

The examples of the strict rules are as follows; Firstly, Article 762 provides that "A person who has established a *new house* may abolish it and enter another house. A person who has become the head of a house *by succession cannot abolish such house*, except where permission to do so has been obtained from a Court of law for the purpose of succession to, or the re-establishment of, the main branch of the house, or for any other just cause." If we compare the first with the second clause of the article above cited, we at once see that this provision is made for the purpose of the continuance of worship. Those who establish new houses have *no house-ancestor to worship* and therefore they are at liberty, if so disposed, to abolish such houses, and to become members of other houses by adoption, marriage or any other arrangement. But with those who have *succeeded* to the house-headship, the case is different. They are entrusted with the duty of worship which it is considered the greatest act of impiety to discontinue. But if they belong to *branch* houses, they may abolish them in order to continue or revive the worship of the ancestors of the *main* houses form which their own have sprung.

The second example is the Article 744. "The legal presumptive heir to the headship of a house is not permitted to enter another house, or establish a new one, except in cases where the necessity arises for the succession to the main branch of the house." A legal presumptive heir is *heres necessarius*, and to him falls the duty of succeeding to the headship of his house and of

upholding the continuity of its worship. For that reason, he or she cannot become a member of another house by marriage, or adoption or any other cause, nor found a house of his or her own, except where the more important duty of preserving the continuity of worship of the main branch of the house renders such a step necessary. Sometimes hardships arise from the operation of this rule. For instance, a male head of a household or a male legal presumptive heir of a house cannot marry the only daughter of the head of another house, owing to the fact that she is the legal presumptive heiress to the headship of the latter house. In such cases the only alternative is to disinherit the heiress according to the provision of the Code, which requires the judgment of a Court of law (Art. 975), and thus enabling her to enter another house by marriage.'(24)

In Hozumi's view the aim of the house as a legal institution in Japanese Civil Code is to continue the ancestor-worship of the house in the very time of transition towards individualism at the end of 19th Century. We may ask whether or not Japanese Civil Code was successful in maintaining the ancestor-worship. If not, what is the reason for the failure?

Before answering the question, in comparison with Hozumi's study I shall look at Maine's discussion of the ancestor-worship in his later work, *Early Law and Custom*, London, 1883. Maine discusses ancestor-worship in Chapter III *Ancestor-Worship* (52–77) and Chapter IV Ancestor-Worship and Inheritance (78–124).

Maine says as follows;

'M. Fustel de Coulanges was the first modern writer to bring into full light, in his brilliant book ' *La Cité Antique*,' the hitherto little observed importance of the private or family worship of the Greeks and Romans. Almost all attention had been concentrated on the greater Gods of these societies. In their honour, temples were raised, oxen were led to the altar, processions moved along the streets, religious confraternities were formed. These were Gods of Nations or Tribes, Gods born of primitive observation of Nature and primitive reverence for her, Gods sprung from wide-spreading emotional movements, like Dionysus and Cybele. But they lived far away in their own Olympus, and the real effective worship of the Roman was to the Lares and Penates. Their clay or metal images stood in the lararium or penetralia, in the innermost recesses of the house, and represented forefathers who in the earliest days had actually been buried in it before the hearth. At their head was the eldest of them, the Lar Familiaris. This private worship, like the public worship of the greater Gods, had its ritual, its liturgy, and its priesthood within the circle of the family; and the intimacy

with which it mixed itself with all family relations is the staple of the striking argument which fills 'La Cité Antique'.

Ancestor-worship is still the practical religion of much the largest part of the human race. We who belong to Western civilisation are but dimly conscious of this, mainly on account of the Hebrew element in the faith of Western societies. Sacrifice to ancestors was certainly not unknown to the Hebrews either as a foreign practice or as a prohibited idolatry. — — — But all sects of Hindus, and all the multitudes affected by Hinduism, worship their ancestors. *The ancient religion lately revived by State authority in Japan at the expense of Buddhism, and known as Shintoism, appears to be a form of ancestor-worship;* the Chinese universally worship their ancestors; and these, with ancestor-worshipping savages, make up the majority of the human race.'(25)

It is striking that Maine explicitly mentions Japanese Ancestor-worship and regards it as Shintoism which is the ancient religion and revived by the State at the expense of Buddhism. It is uncertain where and from whom he was informed of Japanese Ancestor-worship. But it is certain that he was not informed from Hozumi who read and was deeply impressed by Maine's *Ancient Law* but never met nor had any correspondence with Maine. It should also be remarked that both Hozumi and Maine refer to La Cité Antique of Fustel de Couranges.

Maine also says as follows,

'It may well be believed that ancestor-worship, by consecrating, strengthened all family relations, but in the present state of these inquiries the evidence certainly seems to be in favour of the view that *the Father's Power is older than the practice of worshipping him*. Why should the dead Father be worshipped more than any other member of the household unless he was the most prominent—it may be said, the most awful-figure in it altering his life? It was he, according to the theory which I have described, who would most frequently show himself, affectionate or menacing, to his sleeping children. This opinion is fortified by the recent investigations into the customary law of the Punjab, the earliest Indian home, I must repeat, of the Aryan Hindus after their descent from the mountain-land of their origin. Ancestor-worship does exist among the Hindus of the Punjab. But it is a comparatively obscure superstition. It has not received anything like the elaboration given to it by the priesthood in the provinces to the south-east, many of whose fundamental doctrines are unknown to the Punjabee communities of Hindus. Nevertheless, the constitution of the Family is entirely, to use the Roman phrase, 'agnatic; 'kinship is counted through male descents only. There is a very strong resemblance between these usages and the most

ancient Roman law, and their differences, where they differ, throw very valuable light on the more famous of the two systems.

The truth seems to be that, although Ancestor-worship had at first a tendency to consolidate the ancient constitution of the Family, its later tendency was to dissolve it. Looking at the Hindu system as a whole, we can see that, as its historical growth proceeded, the sacerdotal lawyers fell under a strong temptation to multiply the persons who were privileged to offer the sacrifices, partly in the interest of the dead ancestor, chiefly in the interest of the living Brahman. In this way, persons excluded from the ancient family circle, such as the descendants of female kinsmen, were gradually admitted to participate in the obligations and share in the inheritance. Some traces of a movement in this direction are to be found throughout the law-books; and a very learned Indian lawyer (Mr. J. D. Mayne, 'Hindu Law and Usage', chap. xvi.) has shown that, wherever in modern India the doctrine of Spiritual Benefit—that is, of an intimate connection between the religious blessing and the civil right of succession--is most strongly held, women and the descendants of women are oftenest permitted to inherit. It is remarkable that the Equity of the Roman Praetor, which was probably a religious before it was a philosophical system, had precisely the same effect in breaking up the structure of the ancient Roman family, governed by the Father as its chief'. (26)

In the above passage the two things seem worth mentioning. Firstly, as regards the relationship between ancestor-worship and father's power (*patria potestas* in Roman law), Maine sees that the latter precedes the former. Secondly, Maine says that although ancestor-worship had at first a tendency to consolidate the ancient constitution of the family, its later tendency was to dissolve it. And, persons excluded from the ancient family circle, such as the descendants of female kinsmen, were gradually admitted to participate in the obligations and share in the inheritance. Here Maine suggests a connection between ancestor-ship and succession.

In the next chapter IV, Maine discusses the relationship between ancestor-worship and inheritance as follows,

'THE close connection between succession to property after death and the performance of some sort of sacrificial rites in honour of the deceased has long been known to students of classical antiquity. A considerable proportion of the not very plentiful remains of Greek legal argument to be found in *the Athenian Orators* is occupied with questions of inheritance, and the advocate or litigant frequently speaks of the sacrifices and the succession as inseparable. 'Decide between us', he says, 'which of us should have the succession and make the sacrifices at the tomb' (*Isaeus*, 'In the goods of

Philoctemon, Or. vi.) 'I beseech you by the gods and immortal spirits not to allow the dead to be outraged by these men; do not suffer his worst enemies to sacrifice at his grave' (Or. ii.). In a former work I pointed out the number, costliness, and importance of these ceremonies and oblations among the Romans, and I insisted on their probable significance as the source of the peculiar fictions which cluster round early family law (*Ancient Law*, 191). The best explanation, I argued, of the facility with which a stranger can be made a son is that, being admitted to the religious observances, he is not distinguishable from a son under his religious aspect. The later experience of the world may show us that in the mere blending of the ideas of inheritance and offering there is nothing to surprise us. It is natural enough. Wherever it has been matter of belief that the surviving members of a dead man's family could do anything to better his lot in the world after death, it has been thought their duty to do it before they entered upon his possessions. (27)

Here Maine argues a strong connection between ancestor-worship and succession and highlights the Athenian family law constructed from the speeches of Attic orators such as Isaeus. Indeed, it does not seem to be just a coincidence that William Jones, Maine's predecessor both in the intellectual and legal career, published the first modern English translation of Isaeus Speeches in 1779.

On the Athenian law, Maine says as follows,

'In works treating of the Athenian law, it is usually stated that when there were no sons daughters succeeded. But this is not an adequate statement of the rule. The daughter of a man who left property but no sons, was not in strictness his heiress. She was, as her Greek name (*epikleros*) indicates, a 'person who went with the property'. As I have said above, her father might compel her by testament to marry the devisee of her share; but, if he died intestate, she was subject to another liability-marriage to his nearest kinsman-which connects itself with some singular branches of our subject to be discussed presently. *In all these Athenian rules, it is to be observed that, while the ancestral sacrifices are constantly mentioned, the object of special care is the devolution of the estate in the household. The religious basis tends to drop away from the law.* Indeed, the wish to prevent daughters from carrying off the patrimony of one household to another is not at all a feature exclusively of sacerdotalised bodies of usage. The secular law of the unsacerdotalised Hindus of the Punjab applies the same principle and exhibits some instructive variants of the Athenian rules ('Notes on Punjab Customary Law,' vol. ii. pp. 75, 81, 184, 239). Under some Punjab usages, the daughter, when there are no sons, inherits a limited interest in her father's

property; but she must resign it when she marries. It is usual, however, for the husband of such a daughter to be adopted by his father-in-law. The legitimate sons, and the son of an 'appointed' daughter, have in their veins the blood of the father to whom they sacrifice and succeed. But when there are no sons, and when there has been no appointment of a daughter, we are introduced by the law-books to a number of possible successors whose sonship is altogether fictitious. I know no part of the ancient Hindu law more curious than this, or demanding more imperatively to be taken into careful account by all who investigate the beginnings of organized human society. That ancient family law is entangled with fictions has long been known. (See my 'Ancient Law,' p. 130) One of them has been so long before our eyes as to be comparatively familiar to us. *This is Adoption,* the engrafting on the family a son from a strange house. Its importance as a private institution at Rome and Athens is of course well known to students; and, among the Romans of the Empire, it became politically important in a high degree as one of the chief expedients for bringing about the peaceable succession of Prince to Prince. It is true that to Englishmen, nowadays, it is little more

than a name; to adopt a child is to nurture and educate it, and perhaps to provide for it by Will. But in the French Civil Code (liv. i. 8; tit. 8, c. 1), and other Continental Codes founded on the French, Adoption survives as an institution: a childless man, though under somewhat severely restrictive conditions, may take to himself an adoptive child who will be entitled to succeed to his property. This familiarity with Adoption, during such a length of history, blinds us to the fact that it is one of the most violent of fictions.'(28)

Maine continues,

'At Athens, the most nearly corresponding institution differed considerably from the Hindu form. I have stated that an Athenian father might provide, like an Hindu, for the continuance of his family through the son of a daughter; but if, dying sonless and intestate, he allowed his property to descend to a daughter without special arrangement, she became the Orphan Heiress (or *epikleros),* who makes a great figure in Attic law. She had no power of choosing a husband for herself, but it was the right of her nearest kinsman to marry her and his duty to marry or portion her. The right seems in fact to have been keenly disputed; there was a special proceeding (or *diadikasia*) for deciding between different claimants, and men often divorced their wives in order to marry the heiress. The same principle was applied to a group of daughters, whom their various kinsmen in order of proximity had to marry or provide with a portion. The object, of course, is to keep the property in the family, and, ff possible, to provide that the daughter's

children should derive a stream of its blood from male descents. An even more remarkable application of the principle occurred when the children left were a brother and sister. In such a case the duty of the brother was to portion the sister, *but if she were only a half-sister, the strong Athenian feeling against the marriage of brothers and sisters had to give way, and he might marry her and save the portion to the estate.* This power could not, however, be exercised, if the sister were uterine, that is, a child by the same mother though not by the same father; and this limitation has been thought a survival of the remote age at which the Athenians counted kinship through females only. But marriage with an uterine sister would have no tendency to promote the object aimed at. She would have no rights over the father's estate, and marrying her would not help to keep it From diminution and to preserve in its integrity the fund for the ancestral sacrifices. (note, This is the explanation of M. Fustel de Coulanges (*Cité Antique,* p. 83), which seems to me conclusive. He observes that an emancipated son did not enjoy the privilege). Let me repeat that, in most of the Athenian rules about the rights and duties of the nearest kinsman, we have illustrations of the tendency, manifest also in the last chapter of the Book of Ruth, of ancient contrivances for continuing the family to become mere modes of succession to property. A few words will not be thrown away on the probable origin and meaning of this group of institutions. The Levirate, which is a special case of the Niyoga and under which one brother raises up seed to another, has had a definite place assigned to it by the late Mr. J. F. McLennan in the evolution of society. Originally, I understand him to lay down, there was promiscuity in the relations of the sexes. This promiscuity became limited by Polyandry, one wife having several husbands. These plural husbands came in time to be always brothers, and the Levirate is a relic of this form of Polyandry. It would not be quite easy to bring all forms of the Niyoga (of which the Levirate is, as I have said, only a special case) under this ingenious theory; but I will confine myself to saying that the explanation is not the one suggested, to my mind at all events, by the antiquities of Hindu law. Let us suppose that in a particular society an intense desire has arisen for male issue, whether through its worship of ancestors or otherwise.'(29)

Maine says,

'In the ancient legal systems of the Western world there is a visible connection between inheritance and provision upon marriage. Under Athenian law, when sons have failed and the father has died intestate, daughters must be either married to kinsmen, or portioned by them under the system which I have described. The ancient Roman law, at the earliest stage at which we know it, is thought to have allowed some share of their father's

inheritance to daughters. But the Roman law has bequeathed to modern jurisprudence the doctrine that, under certain circumstances, a marriage portion is to be deemed an 'advance' of a legacy to a

daughter, and, conversely, that a covenant to settle a portion is 'satisfied' by a legacy. I have always suspected that this doctrine inverted the principle of the oldest law: and that, anciently, the daughter only succeeded when she had not been portioned. In the *Joint-Families of modern India,* and in the *Slavonian House-Communities,* though the estate may be regarded as belonging to the male members of the household, the women are entitled to a portion on marriage, generally amounting to some definite fraction of the share which their brothers would receive on a division; and in India, when the property of a joint-family is distributed, the law saddles the shares with a liability to 'maintain' the unmarried women and widows. Nowhere, so far as I know, are women left without provision in ancient societies which have made even a slight degree of advance. The real prejudice or reluctance is against allowing them to confer on their husbands, to whom they are generally married in infancy, any rights over the kind of property, such as land, by which the community lives and holds together. But a provision for them by means of property which is actually movable and transferable is thought not merely just and fair, but so imperatively required that it would be a violation of decency and a blot on the family honour to omit or refuse to provide it.'(30)

Maine continues,

'I have already stated my belief that at the back of the ancestor-worship practised by Hindus there lay a system of agnation, or kinship through males only, such as now survives in the Punjab. I so far agree with the theory of M. Fustel de Coulanges that I believe this system to have been at first greatly strengthened by ancestor-worship. But it seems to me plain that ancestor-worship in its later growth, acted as a weakening and dissolving force upon the ancient kinship and the ancient family. The secular law followed by Hindus was not, however, equally or universally affected by the religious development. The Mitakshara, which is, on the whole, of more authority in India than the Daya-Bhaga is manifestly based in the main upon the more ancient conception of kinship. At the same time I do not regard the system of the Daya-Bhaga as simply an after-growth of the system reflected in the more archaic treatise. It is rather a separate development of the ancient sacerdotal law. The ideas which led to it are more or less discernible in the oldest treatises, but they seem to have been carried to their consequences in some law-schools more rapidly and completely than others. Nobody will understand the relatively late collection of rules called after Manu, who does

not recognise that it has been materially affected by the religious transformation. Among the forces which have caused and directed the progress of human society, one of the most powerful has been the Edict of the Roman Praetor, which gradually brought law into harmony with a set of principles known under their most general designation as Equity.

It completely transmuted the Roman jurisprudence; and the system, formed by its infiltration into older rules, is the fountain of nearly all modern Continental law, of some part of the English law, and of the greatest part of the existing Law of Nations. These principles were finally considered by the Roman lawyers to fit in with a Greek philosophical conception, the Law of Nature, which was destined to have a serious influence on human thought down to our

own days.'(31)

Maine concludes as follows,

'But the ancient Roman law of inheritance was closely implicated with ancestor-worship. This at all events must be taken as placed beyond doubt by M. Fustel de Coulanges. The ancient Hindu law had undoubtedly the same basis, but it underwent in parts of India very much the same modifications as the Roman law, and became a system of inheritance, allowing kinsmen through females to inherit as well as kinsmen through males. The newer Hindu law, however, carries with it the explanation of its own origin; the religious element in it has been transmuted, and the law with it. I suggest, therefore, that the Roman Equity had its beginning before legal history began, in a modified ancestor-worship and a change in the religious constitution and religious duties of the family. There are no ancient philosophies, and perhaps not many modern philosophies, which may not be suspected of having their roots in a religion. The Athenian law corresponds in some of its rules of collateral succession to the later rather than to the earlier Roman law, and here, too, I suggest that a change was produced by an alteration of religious ideas.'(32)

It does not seem to be fair that I shall compare the passages of Hozumi on the ancestor-worship with those of Maine on equal terms. First of all, Hozumi's book which is based on a lecture at the International Conference, is very limited in its length and aim. It is not a comprehensive study of ancestor-worship at all, though the Part I of the book contains the general survey of ancestor-worship. Indeed, Hozumi refers to La Cité Antique of Fuster de Couranges. (33)

As quoted above, it is interesting that Hozumi separates the origin of the ancestor-worship between the two, the one is the love of the dead (ancestor) and the other the dread of the dead. According to each origin, he also

draws a distinction between ghosts who are to be dreaded and those who are to be loved and respected. The ghosts of enemies and of those who have met an unnatural death belong to the former while the ghosts of ancestors belong to the latter. Sacrifices are offered to ancestors' spirits from love and respect. This practice, Hozumi argues, arises out of *natural impulse* of kinsmen to provide their dead relatives with food, drink and clothing as in the days of their life. And he quotes the passage form Book of Medium of Confucius., 'it is the highest filian piety to serve the dead as they would serve the living, and to serve the departed as they would serve the present.'(34)

It should be noted that Hozumi attributes the origin of the sacrifice for the ancestor to the natural impulse and refers to Confucism. This is sharply contrasted with the theory of the 'dread of the ghost' which finds the origin of the sacrifice in the propitiation of the ghost. He says, 'However strange the expression may sound to *Western ears*, it would be more accurate to assert that it was the 'Love of Ghost' which gave rise to the custom of Ancestor-worship.'(35)

Strikingly enough, Hozumi seems to believe that only the Japanese, or the Easterners, love their (ghosts of) ancestors while the Westerners may not. I do not know where such an ungrounded and 'happy' belief of Hozumi comes from. Of course, as quoted above, he does admit that ghosts of enemies and unnatural deaths cannot be loved but feared. I wonder whether or not he did believe he could explain everything about the ancestor-worship by the 'natural impulse' of kinsmen. (36) If he did, it comes to the conclusion that the Westerners do not have the natural impulse, in other words, they are not 'natural'!

It is apparent that Hozumi's argument is neither rational nor evidenced. He looks very naïve. He draws, I assume, a picture of the ancestor-worship from his own family background. He comes from a 'samurai' family in a provincial town called 'Uwajima' in Shikoku Island. It is usually said that the family law of Japanese civil code of 1898 is modelled on the samurai family in the period of Tokugawa Shogunate which continued under the regime of feudalism from 1603 to 1867. Apart from the royal (Imperial 'Kozoku') and noble ('Kazoku') families, in the Japanese family law of 1898, there remains no distinction among the others. The Law of House Registration of 1898 ('Koseki-Ho'), only provided a space in which one could write his previous class as 'Shizoku (samurai)' if he came from the samurai family in the period of Tokugawa Shogunate. The others were called 'Heimin' (commoners). However, there is no distinction beyond that. The name of 'Shizoku' does not give any privileges in legal terms.

The most distinctive feature of the Japanese family law until its replacement by the new one of 1947 is the status of the 'Head of the House'('Koshu'). Indeed, according to the Law of House Registration each house is registered under the name of the head of the house and can encompass, for example, his married sons. It is much larger than the modern nuclear family. Namely, under the current law of the house registration the head of the house no longer exists. The existing name is the 'first' member of the house registration. He or she has no legal power which the head of the house used to exercise, such as the right of permission of the marriage of his house members.

However, as Hozumi mentions (37), the Japanese Civil Code was promulgated in the time of social transition from status to individuals. One of the difficulties facing the family law of Civil Code of 1898 was that the head of the house can be female if the daughter is the only descendant of the parents. In such a case she cannot marry a man who is to become the head of his own house because either her house or his will disappear. Her freedom of marriage will be narrowed by the Japanese old family law till 1947. This is the same for the male if he is the only child who will succeed the head of the house. The logic of maintaining the house overrides the individualism.

Hozumi argues that the purpose of the provisions concerning rights and duties of the head of the house is to continue the house and the purpose of continuing the house is to maintain the ancenstor-worship. He says as follows,

'For the law recognises the tendency of social progress toward individualism, but, at the same time, it makes careful provisions for the continuity of the house. The house is the *seat of Ancestor-worship* (italic by Hozumi), and, therefore, the discontinuance of the house implies the discontinuance of worship. It is for that reason that the Civil Code contains many strict rules against the discontinuance of the house.' (38)

It is not difficult to find here the aim of Hozumi's historical and comparative study on ancestor-worship in the registration of the Civil Code. This relationship between the method of historical and comparative study and the registration is exactly the same as in the historical and comparative jurisprudence by Maine and Pollock. And if we could put Bogišić in this context, he could also be counted as one example of the historical and comparative jurisprudence.

I shall quickly look at the history of the Japanese family law of 1898 and the head of the house in particular. As I mentioned above, Maine points out in his *Early Law and Custom* in 1883, the Japanese ancient religion is lately revived by State authority and appears to be a form of ancestor-worship. This remark was given before the Civil Code of 1898 because the Worship

of the Imperial Ancestors had been established according to Shintoism, and at the expense of Buddhism, since the Meiji Restoration in 1868. Therefore it can be said that the ancestor-worship in Japan was established as a state religion. It was consolidated in the Constitution of the Empire of Japan in 1890. (39) The ancestor-worship of the state was not only imposed upon the individuals but also used as a model of the ancestor-worship of each house of the individuals. As Maine says, It was a 'violent' fiction.

The ancestor-worship may have existed and still does in some particular houses of some particular social classes in Japan. But it had been already in decreascendo at the codification of the Civil Code of 1898. Also the Japanese family had been becoming more and more the nuclear family under the industrial revolution since 1900. In particular, it became costly and troublesome for members of the family who moved to Tokyo area to attend the ceremonies of the ancestor-worship which were being held in their birth places where their ancestor tombs were built. The gap between the custom and the registration had been becoming wider and wider. After 1947 when the old family law was abolished and replaced by the new one which abolish the system of the head of the house. The family has come to consist of parents and unmarried child(ren). The article (897), which says that the ownership of the archives of the family tree, ritual items, and tombs belongs, according to the custom, to the person who performs ancestor-worship, only reminds us of the reminiscence of ancestor-worship.

4. CONCLUSION—A LEGACY OF 'ANCIENT LAW'—

Maine's *Ancient Law* was published in 1861 when the study of law at Universities of Oxford and Cambridge was being becoming an independent academic discipline and also the Inns of Court was trying to establish academic chairs of law. Indeed, after his appointment to Regius Professor of Civil Law at Cambridge in 1847, which had been long established since 1540, Maine was appointed successively to, firstly, Reader at the Inns of Court in 1854, secondly, newly established Corpus Chair of Jurisprudence at Oxford in 1869.

As is well known, there was another attempt to establish jurisprudence as an academic discipline at London. This was done by John Austin, who became the first professor of jurisprudence at University College London in 1826. In contrast to University College London which was newly founded, both Universities of Oxford and Cambridge had long established academic disciplines such as Classics, Divinity and Mathematics. The study of law had long meant the study of civil (Roman) law while the professorships

dedicated to the study of Common Law were established as Vinerian Professor in 1758 at Oxford and at Cambridge as Downing Professor in 1800.

Under those circumstances 'Ancient Law' was meant by Maine to work as a paradigm of jurisprudence; by a paradigm I mean the new jurisprudence which Maine envisaged is expected to offer a new and comprehensive framework which can be applied to all branches of law from historical, comparative and contemporary perspectives. These three perspectives are neither exclusive nor hierarchical to one another, in other words they are complementary.

Firstly, the historical perspective; This perspective has been hitherto most discussed, particularly because of the famous phrase, *from status to contract*. This aspect has been, in association with Darwinism, too much emphasized. Burrow has rightly observed as follows;

'Because Maine was not a systematic thinker, and because he never fully recognized the conflict between the historical and scientific elements in his intellectual equipment, it would be possible, by selective quotation, to make out a convincing case for either view of him -that he was a legal historian with perhaps too great a fondness for cross-comparison and 'brilliant' generalization, or that he was a rigid evolutionary determinist.' (40)

The term 'historical' is ambiguous; it is concerned with the change of the society, with contrast to, for example, the theory of natural law which insists that there is the natural law which pervades anytime and anywhere. Then, there can be two ways of the historical approach, the one is devoted to the rule or theory of the change of the society, such as evolutionism or Marxism (a sort of evolutionism). The other is devoted to the evidential proof of the historical documents and records. Indeed, the champion of the latter methodology and achievements was Frederic William Maitland (1850–1906) who 'was critical of Maine's assumptions and cavalier way with the original sources'. (41)

Secondly, the comparative perspective. Maine's argument draws mainly on the materials of Roman, Greek, Medieval (Feudal), Common, Continental (Natural) laws as well as Hindu law. Drawing a parallel between the language and the law, Maine assumes that European laws in general, but Roman law in particular, and Hindu law have common features which form the shape of 'Ancient Law'. This assumption was obviously based on the 'Indo-Aryan' Myth and doomed soon to be heavily criticized. (42)

Nonetheless, it should be remarked that by including Hindu law into the comparative studies the range of comparison was much broadened. It should also be noted here that the broadened perspectives enabled Maine

to pay special attentions to other laws than Roman, Continental and Common laws, which include Slavonic, Greek and even Japanese laws.

Bogišić and Hozumi can be placed in those comparative contexts. We have seen the discussions of house communities and Raajipoots in Bogišić's research in Slavonic law and those of the ancestor-worship in Hozumi's treatise. Unless Maine had not widened his legal scope by the notion of 'Ancient Law', it would have been impossible for him to take Slavonic law and Japanese law into account.

Furthermore, it is interesting that the (Ancient) Greek law came to attract special attentions for the comparative studies from William Jones (43), Rodolphe Dareste (1824–1911)(44), Gustave Emile Boissonade de Fontarabie (45) as well as Maine. It is worth mentioning that Dareste was a collaborator and French translator of the General Property Code of Montenegro and the Japanese Old Civil Code of 1890 (except for the part of family law) was drafted by Boissonade. The reason why the Greek law, the Athenian law in particular, drew much attentions in the studies of 'Ancient law' in late 19th Century was presumably that some forensic speeches of the orators in 4th Century BCE contain a high degree of complicated legal discussions on the law of inheritance which appear to have the equal quality as the modern law does. (46)

Lastly, the contemporary aspect. As shown above, Maine's knowledge and interest in Hindu law comes from his experience as legal member of the Governor-General's Council of India and the President of the newly established University of Calcutta. The practical aim of the comparative study of law is the legislation, which is common in the cases for Maine, Bogišić and Hozumi. As the subtitle suggests, to study 'Ancient Law' aims to recognize the gaps and foresee the difficulties if the modern legislation will be laid down to the uncivilized societies. In this sense 'Ancient Law' is a mirror of the contemporary European, Continental or Common, law in the late 19th century.

Ironically the limits of 'Ancient Law' were destroyed by the new methodology and scope of Anthropology in 20th Century. For example, Max Gluckman's works have shown how the uncivilized society displays a high degree of complex litigations. The foreword of Gluckman's monumental book was written with high recommendation by A. L. Goodhart who became the Corpus Professor of Jurisprudence after the historical jurisprudence deceased. (47)

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** The following books of Maine and Pollock are listed in the catalogue of Bogišić Library.

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NOTES

1) Underlined by Kasai unless otherwise mentioned, Maine (1861), 168–170.

2) Burrow (1966), 98; also, Stein (1980), 99.

3) Burrow (1966), 138–139. Cocks (1988), 9, 20–21. Cocks also argues that Maine was mainly occupied with the interests in comparative philology rather than ancient law, which is the same case with Sir William Jones (1746–1794).

4) Stein (1980), 86–87.

5) Stein (1980), 91.

6) Nicholas (2000), 385–396.

7) Maine (1861), 129–130.

8) Maine (1861), 143.
9) Maine (1861), 266–268.
10) Mr Yoshihide Higa kindly gave me the information as follows; Lyall was Agent of Rajputana Agency (1874–1878) and published an article, 'The Rajiput States of India', in Edinburgh Review, No. 295 in 1876. The first survey of Rajiputs (Rajipoots) society was done by James Tod (1782–1835) in *Annals and Antiquities of Rajast'han or the Central and Western Rajpoot States of India*, 2 vols. (1829–32) wnere the author uses the term of 'Rajpoot'.
11) Le droit coutumier des Slaves Méridionaux d'après les recherches de M. V. Bogišić, 1–2, Paris 1876–1877.
12) Čepulo (2010), 89–98.
13) Maine (1883), 232–282.
14) Maine (1883), 240–242.
15) In Bogišić Museum (Library), we found the following books of Maine.
16) Čepulo (2010), 98–109.
17) Čepulo (2010), 110–115.
18) Čepulo (2010), 115–116.
19) The correspondences between Boissonade and Bogišić is discussed in Professor Matsumoto's essay in this volume.
20) Hozumi (1901), 6–7.
21) Hozumi (1901), 10–11.
22) Hozumi (1901), 12–33.
23) Hozumi (1901), 44–46.
24) Hozumi (1901), 46–47.
25) Maine (1883), 57–60.
26) Maine (1883), 76–77.
27) Maine (1883), 78–79.
28) Maine (1883), 94–97.
29) Maine (1883), 104–106.
30) Maine (1883), 109–110.
31) Maine (1883), 118–119.
32) Maine (1883), 120–121.
33) Hozumi (1901), 4, 10.
34) Hozumi (1901), 4–7.
35) Hozumi (1901), 7.
36) Hozumi (1901), 6.
37) Hozumi (1901), 44–45.
38) Hozumi (1901), 45–46.
39) Hozumi (1901), 36–39.
40) Burrow (1966), 164.
41) Stein (1980), 106.
42) Ibbetson (2012), 133–134.
43) William Jones (1779), (2004).
44) Dareste (1867), (1875), (1879), (1885), (1888), (1893).
45) Boissonade (1867), (1870), (1871).
46) Luković (2008).
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