
You might find it strange that a political scientist has written the most important study of Sir Henry Sumner Maine in over a century. If you are familiar with his reputation, you will be surprised anyone has bothered to study him at all. Few intellectual reputations have suffered as steep a posthumous decline as his. No one today would claim Maine as an intellectual ancestor, nor refer to his work except for the odd obscure footnote. Yet in the mid-late nineteenth century, Maine was the towering British legal scholar, holding a succession of prestigious academic posts in Cambridge, Oxford and London. His published works, especially Ancient Law (1861) and Village Communities in the East and West (1871), were recognised as classics in their time and were debated by leading thinkers from John Stuart Mill to Mohandas Gandhi. Maine served as the Legal Member of Governor-General’s Council in India from 1862 to 1869. During these years he also published many popular pieces in magazines like the Saturday Review and St. James’s Gazette. Scholar, lawyer, imperial administrator and public intellectual: Maine appeared to have been the most eminent of Victorians.

Why then has next to nothing been written on his ideas in the last century? Karuna Mantena does not answer this question in Alibis of Empire. At least, not directly. The two dedicated studies of Maine’s thought coinciding with the centenary of his death failed to persuade anyone else to take more than an antiquarian interest in him. In Sir Henry Maine: A Study in Victorian Jurisprudence, Raymond Cocks gives an admirable exposition of the key elements of Maine’s legal thought. But in his attempt to show the reception of Maine’s ‘historical jurisprudence’, Cocks looks to sociology, anthropology and legal positivism, and

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1 His most important posts included: Regius Professor of Civil Law at Cambridge, 1847–52; Vice-chancellor of the University of Calcutta; Fellow of Corpus Christi College, Oxford, 1867–79; Corpus Professor of Jurisprudence, Oxford, 1869–78; Master of Trinity Hall, Cambridge, 1877–88; Whewell Professor of International Law, 1887–88. The last two posts ended with Maine’s early death – he was never a healthy man.


so misses its crucial influence on the ‘pragmatic’ imperial governance reforms in the late century. The second study is a collection of papers on Maine given at Trinity Hall, his old Cambridge college, in 1988.4 This effort at ‘rehabilitation’, as Tony Honoré quipped, has inspired virtually no later legal scholarship.5 In contrast to these studies, Alibis of Empire is an intellectual history that places Maine’s thought firmly in the hurly-burly of nineteenth century debates on the crisis of imperial rule, and the nature of ‘traditional society’, codification, and property. His ideas are far less easy to dismiss when one appreciates their success (outside jurisprudence) in shaping a new imperial ideology after the shock of the Indian Rebellion (or Mutiny) of 1857. Through a subtle treatment of Maine’s ideas, often caricatured by his own catchy dictum that law progressed ‘from status to contract’, Mantena argues that the legacy of his ‘account of primitive society would be used to justify the conscious retreat from freedom of contract and the defense of custom under the rubric of indirect rule’ (17). The liberal idea of ‘assimilating and modernising natives’ gave way to a hardening of the distinction between traditional and modern societies. As the grand civilising justifications lost their power, an ideology of late imperialism replaced it with a new claim to protect native society from anarchy, which ‘functioned both as pretext and solution, as an alibi for the fait accompli of empire’ (11).

This review will first describe the arc of Mantena’s argument in Alibis of Empire where Maine’s ideas catalysed a shift from an imperial ideology of universalist justifications to one of culturalist alibis during the nineteenth century.6 British governors before 1857 accepted a moral duty to transform their Indian subjects from untutored barbarians to gentlemen like themselves by imposing English laws and institutions. From this familiar narrative, Mantena then argues that Maine developed ideas underpinning a new ideology, quite distinct from its ‘liberal’ predecessor, in response to the trauma of the Indian Rebellion (chapter 1). She then analyses Maine’s interventions in debates concerning ‘traditional society’ (chapter 2), codification of law (chapter 3), and the nature of property (chapter 4), which helped replace the universalist justifications for rule with new culturalist alibis. Native ‘society’, both combustible and resistant to change, demanded the pragmatic inventions of customary law and traditional leaders to protect it from dissolution (chapter 5). Maine’s dubious legacy was ‘indirect rule’, which was created in India and transplanted to Africa to govern native subjects of empire unsuited for the democratic politics of their white peers.

The second part of the review suggests how Alibis of Empire might reconnect, rather than rehabilitate, Maine’s ideas to two concerns of legal scholarship today. The jurisprudential question asks in what ways the sociolegal critique of legal positivism re-creates or reformulates Maine’s critique of the analytical

jurisprudence of Bentham and Austin. Both Maine and the sociolegalists claim that the analytic school is ahistorical, either unwilling or unable to account for the evolutionary nature of law. The historical question asks how the new ideology of indirect rule influenced the constitutional history of the British Empire and the national fragments it left in its wake. Mantena argues that it cemented a constitutional divide between self-governing Britain and the settler colonies versus the indirectly ruled Indian, African and other nonwhite dependencies. This analysis is not quite true, however, as Canada, Cape Colony and New Zealand adapted this ideology of indirect rule to segregate indigenous people from politics and their lands from the market. By taking Maine’s ideas seriously, as his contemporaries did, Mantena’s rigorous study opens up new avenues for ‘provincialising’ the enduring parochialism of Anglo-American legal studies.

**IMPERIAL IDEOLOGIES**

Before we begin, it is worth clarifying how Mantena uses the term ‘ideology’, which she defines in contrast to ‘static theoretical constructs’, as ‘a historical constellation [of ideas] evolving in response to a changing set of imperial dilemmas’ (8). She labels the two ideological constellations she sets out to examine as ‘liberal imperialism’ and ‘late imperialism’. Liberal imperialism was a moral justification, or rather a family of such reasons, consisting of well-known Victorian concepts like ‘progress’, ‘civilisation’, ‘Christianity’ etc, which entailed reciprocal duties for ruler and ruled, often analogised to that of father and child. The idea of ‘progress’, for instance, justified imperial governance so long as its rulers sought to transform the moral character of – ie to civilise – the ruled. In turn the ruled should accept their benevolent education peaceably and with gratitude. In the late imperial ideology, the moral/ethical dimension of the erstwhile liberal ideology (a familiar target of Marxist critiques) takes on a distinctive new form as a pragmatic alibi that is ‘difficult to conceptualise straightforwardly as ideology, since it was more often defended in practical and strategic terms as founded less upon ideas than expediency’ (9). Instead of justifying their rule in moral terms, the rulers began to defend actions like, say, the apprenticeship of children, as useful to create a semi-skilled labour force, and so displace or elide claims of improving a child’s moral character. Ideology, in Mantena’s usage, is thus a set of ideas held by British officials or public intellectuals that either justify or defend their rule over non-white people within the empire. As a metropolitan phenomenon centred in London, ideology was perhaps influenced by events overseas, but sustained by an exchange of ideas between British men regarding the purpose and practice of imperial governance. Mantena explicitly rejects the Eurocentric critique of empire exemplified by Gallagher and Robinson, which sees empire as the accretion of many localised struggles.
between imperial and native actors. The archival sources of these ideologies are primarily in texts written by and for these men, such as scholarly books, and magazine and newspaper articles (as well as letters and oral exchanges between them). As the grand European civilising narratives (like the French *mission civilisatrice*) lost their power, Mantena contends a new ideological constellation of ideas eschewed moral language for that of pragmatism.

The story proper begins with the crisis of the Indian Rebellion. Like the American rebellion 70 years earlier, the British responded immediately with brutal violence. Unlike in America, however, the rebels here were ‘natives’, a great subcontinent of seeming barbarians, which would make all the difference. In chapter 1, Mantena argues that this crisis was a catalyst for a new ideology of imperial rule. The pre-1857 consensus agreed upon the origins of empire in the moral wrong of conquest, and thus continued rule could only be justified on the grounds of a liberal mission to civilise the subcontinent as ‘a standard of moral duty concomitant to the status of the ruling power as a free, civilised people’ (21). The idea of a moral duty resolved the paradox, as these men saw it, of a free people ruling over a subject people. How was this moral resolution to work in India? Burke suggested reforming British rule as a trust based on implicit consent of the ruled with the East India Company made accountable to the free parliament at Westminster. James Mill agreed, though he also saw native society as ‘corrupt’, and thus unable to support the institutions of governance without imperial support (27). Another former East India Company employee, Charles Grant, a Clapham Sect man, stressed the evangelical element of this liberal ideology that good English laws and institutions were insufficient without education. Under guidance of the benign trust, the British could produce a class of Indians ‘fluent in English and English manners’ to assimilate with their rulers, and so form bonds of sentiment to reinforce and eventually replace this benign, if despotic, rule. J. S. Mill, yet another East India Company man, provided perhaps the most sophisticated defence of this view. If it were true that a people’s character determined their form of government, he argued, it was even more true that their government determined their character. By stressing ‘character’, Mill rejected inherent racial limits on the progress of Indians, even if his barbarous/civilised distinction approximated it (36). This liberal consensus was both universal and teleological since, as Mantena puts it, the idea that ‘native societies could be radically and rapidly transformed, was sustained by a belief in the infinite malleability of human nature, itself tied to an assumption about the universality of such a view’ (30). The practice of British rule in India to create a class of ‘native’ Englishmen to inherit the transplanted English laws and institutions was also the moral justification and teleological end of imperial rule.

If the Indian rebellion shook this liberal imperial consensus, Mantena believes the Morant Bay rebellion split it. The Governor Eyre controversy of 1865 polarised British intellectuals into the liberal imperialists, like J. S. Mill, Charles Darwin and Herbert Spencer, against the new, conservative imperialists such as Thomas Carlyle, John Ruskin and Matthew Arnold. Mill and his allies sought to
indict Eyre for his crimes against the ethos of liberal imperialism, while his opponents condoned Eyre’s brutality as necessary and expedient. Mantena characterises the latter as revisionists who constructed ‘late imperialism’ by first disavowing the ‘conquest’ itself to undermine an increasingly fragile liberal consensus (45). James Fitzjames Stephen, like Maine a former Law Member in India, held the strong view that authoritarian (but not arbitrary or despotic) rule was necessary for a barbarous Indian society. For Stephen, the discipline of English virtue would replace the moral mission of empire.10 J. R. Seeley gave a more ambivalent account in *The Expansion of England* (1883). Like other liberals, he saw the ultimate *telos* of empire as Indian self-government. But he did not see ‘conquest’ as either an accurate historical account of British rule over India or the justification of its dependent status. In his account local Indian elites invited the British to fight their enemies, which led to eventual and quite accidental British rule. This accident held no moral duty, though Seeley argued for the British to stay on the expeditious grounds that India would decay into a natural state of chaos if abandoned.11 Perhaps most importantly for the subjects of British rule themselves, Lyall and Cromer, influential bureaucrats in India and Egypt, rejected any ‘slow introduction of representative institutions’, which was key to the liberal imperial goal of civilised self-government (49).

It was into this rhetorical storm that Maine launched *Ancient Law* in 1861. He had blamed 1857 on an ‘epistemic’ failure by administrators who did not understand native society (50). If they had such knowledge, they could have prevented the fiasco of tallow-greased cartridges, seen at the time as the proximate cause of the rebellion. New sociological questions were thus entangled with pragmatic imperial ones. Maine dismissed the old liberal imperialism as holding ‘that Indians required nothing but School Boards and Normal Schools to turn them into Englishmen’ (quoted at 50). With his historical turn, Maine stressed both the ‘filial’ connection between Indian and English institutions, and their radical difference. In native societies, the impact of British rule and institutions threatened their stability and could lead to the chaos of 1857. Mantena takes this as the moment when ‘subject societies began to function as the displaced site of imperial legitimation, whose immanent logic and crises necessitated continued imperial rule and protection’ (53). The key to this ideology of late imperialism, Mantena argues in chapter 2, was its stress on the nature of native society. Maine’s epistemic remedy for 1857 demanded that European knowledge of native culture and society become ‘more systematic in character as it was increasingly tied to the dynamics of imperial governance’ (57). The questions he asked would also help to create two new ‘scientific’ disciplines to answer these questions: (i) sociology, by contrasting the corporate nature of traditional societies with individualist modern societies; and (ii) anthropology, with his idea of patriarchal kinship as structuring social interaction in traditional communities.

10 Stephen was a life-long friend and supporter. They had met as undergraduates at Cambridge where Maine had nominated Stephen for membership in the Apostles: Feaver, n 2 above, 13.

11 For Mill, nationality was thus normative, rather than sociological, and thus an equivalent to self-government based on a civilization test. For Seeley, however, ‘India’ was not a polity/nation but simply a geographic expression.
Maine contrasted his turn to society as the locus of law with what he understood as the earlier ideas exemplified by Locke and Rousseau of a barbarous, yet notably ahistorical, individual in a state of nature. Maine leveraged a gap first opened by Benjamin Constant’s contrast of ‘ancient and modern liberties’ to establish a more radical divide between ancient (or traditional) and modern societies. Primitive man was no ‘noble savage’, radically free in a state of nature, but rather a member of a primordial, historically-existent corporate body: the patriarchal family (66). As primitive societies evolved ‘from status to contract’, the basis of legal rights progressed from an individual’s membership in the family to his rights in a marketplace. Maine’s memorable phrase echoed other binaries in the contemporary work of continental thinkers imagining the social: Tönnies, Gemeinschaft/Gesellschaft; Durkheim, mechanical/organic; Spencer, militant/industrial; and Gierke, societas/civitas. The sociological turn was more than methodological since, by putting ‘society’ at the centre of analysis, it reversed the relationship between political and social relations in forming the individual, as Mantena stresses:

While the individual, in terms of behavior as well as beliefs, was conceived of as a product of social structure and thus was by nature both diverse and in principle subject to profound variation, the idea that human nature could be radically and rapidly changed by deliberate institutional transformation was foreclosed (71).

Whereas J. S. Mill talked of transforming the barbarous character, Maine and other disillusioned revisionists held that society and the individual were no longer perfectible through politics.

India was key to this sociological turn. Maine modelled his historical jurisprudence on the comparative philology of his day that traced European and Indian languages to a common ‘Aryan’ root. (Notably, he reached his key conclusions regarding Indian village-communities before ever visiting the sub-continent.) Just as English and Hindu had a shared linguistic ancestor, he reasoned, so must their laws. Both ‘Aryan’ laws shared a primordial form as a corporate family bound by paternal kinship relations. Over time the family bonds were loosened and individuals emerged with discrete legal rights. This shift from familial to locality or territorial politics was, for Maine, a world-historic revolution. As he put it: ‘England was once the country which Englishmen inhabited. Englishmen are now the people who inhabit England’¹² (quoted at 79). Since unevolved India was not yet transformed in this manner, its village communities were a ‘living history’ of ancient English laws and institutions. His comparative method, such as it was, looked at the village communities as historic nodes on the ‘branches of the Aryan tree’, which included Ireland, England, India, Rome and Germany. Traditional societies, whether ancient Rome or contemporary India,

¹² Mantena shows that Maine is making a very important point, not as some historical truth, but as a critique of liberal imperialism. Replacing India for England, we get: ‘India was once (and still is) the country which Indians inhabited.’ Nothing had changed in Maine’s view since Indians had not progressed (to put it bluntly) from status to contract. The term ‘India’ was a geographical expression, as Seeley had argued, that did not entail any internal, political cohesion. Indians were not (yet) a political people with a territory.
were always pre-modern since, as Mantena argues, Maine’s theory was ‘less a ladder of civilisation upon which all societies are placed hierarchically than a spatial frontier where bounded societies live side by side, yet, significantly, in different temporalities’ (83). The Indian village community was self-sustaining, a holistic society whose cultural forms enmeshed the primitive individual imagined by the liberal imperialists. Maine’s peers would have understood that it was far easier to climb the liberal ladder than leap the traditional-modern chasm.

In 1862, the Governor-General’s Council enacted the Indian Penal Code based on the text drafted 25 years earlier by the First Law Commission chaired by Macaulay.13 The law set out a clear statement of liberal imperialism that promised, as Mantena puts it in chapter 3, ‘the universal [Benthamite] benefits of uniformity and certainty in the law, and also guarantee equality between European and native subjects’ (95). A year earlier Henry Maine published his Ancient Law, which set out a curious historicised notion of legislation informed by his sympathies with Friedrich Carl von Savigny and the German Historical School. Unlike Bentham and Austin, Maine saw law as an evolutionary process passing from arbitrary edicts, then custom, and lastly codification, by means of corresponding interventions of legal fictions, equity and legislation.14 The difficulty with the last step, however, was that if custom was codified too early it undermined the rule of law, as in ancient Greece, and if too late, entrenched superstition, as in the Hindu laws of Manu. Legal fictions, like adoption in early patriarchal families, were, in Maine’s words, ‘any assumption which conceals, or effects to conceal, the fact that a rule of law has undergone alteration’ (quoted at 105). Equity drew on natural law to form a source of law outside civil law with which to criticise and reform it. Legislation was the final means for law to evolve under the rational authority of the state. In this quite specific context, Maine praised Bentham for his plans to codify aspects of the common law on rational principles such as scientific classification and simplicity, even after this had fallen from fashion by the 1870s.

Maine’s ambiguous critique of utilitarian ideas of codification, Mantena contends, went deeper to challenge normative claims about the nature of politics and sovereignty (113). His historical and anthropological turn sought to undermine the universality of Austin’s premise that law derived from the commands of a sovereign. If Austin’s claim were true, then the customs of neither an Indian village community nor a primitive paternal clan would be the proper subject of jurisprudence. But why, Maine asked, should we accept Austin’s allegedly universal and ahistorical model of a Hobbesian sovereign? Mantena captures this point nicely: ‘what Austin had described as an analytical distinction between law and morality was in fact [for Maine] a historical distinction between two distinct but unequal forms of political societies in which the emergence of one led to the decay of the other’ (116). Moreover, Maine’s wide-ranging historical sources seemed to show that law was obeyed for many reasons besides fear of coercive force. His ‘corporatist critique’, as Mantena calls it, of sovereignty in analytic

13 Act no 45 of 1860.
jurisprudence was animated by a suspicion of contemporary democratic reforms that destroyed older local bodies distinct from the national body politic. She explains this in connection with Maine’s deepening conservative worry ‘that the expansion of the franchise would threaten the security of property and individual rights, or in other words, the historical achievements of the liberal age’ (117). Maine’s fear of democratic reforms in Britain thus informed the methodology of his historical jurisprudence.

Mantena takes up Victorian debates on the origins and nature of private property in her fourth and most important chapter. In contrast to his contemporaries, who sought to justify property rights by invoking an idealised state of nature, Maine’s historical and comparative turn placed individual rights at the end of an historical evolution from communal origins. Driven by an (ever ambiguous) engine of ‘progress’, his teleological account imbued private property with normative value as ‘a progressive historical achievement’ (120). Individual property was the teleological end of a civilised society. For British India, Maine’s ideas led to a rethink of land tenure and a revival of the village-community as ideal. His intervention helped shift the nineteenth century debate on the origins of property rights from the idea of individual appropriation and occupation in a state of nature to a historical study of evolution from communal to individual rights. As Mantena argues, ‘Maine’s thesis on communal property was pivotal in cementing a view of native society in which its identity and integrity was closely tied to the shared possession and exploitation of land’ (121). For imperial administrators trying to govern native societies, seemingly in shock from their rapid modernisation, his ideas would buttress a new, ‘pragmatic’ ideology of indirect rule to maintain order.

As we have seen, Maine’s historical and comparative method targeted the ‘natural man’ central to accounts of property rights in utilitarian jurisprudence, as well as of social contract. His work canvassed a range of ‘Aryan’ legal sources, often derived from secondary writings, in ancient Rome, medieval agricultural communities (especially Germanic ones), and Indian village-communities. In *Ancient Law* he argued that individual property rights were, like languages, evolved from a common Aryan root rather than contracted in a mythic state of nature. His historical jurisprudence shifted the question of property from why individuals had a natural instinct for it, to why an institutional idea developed that, in another catchy phrase, ‘everything ought to have an owner’ (quoted at 126). Maine applied an idea of ‘progress’ to these examples to derive a teleological rule that property evolved from communal to individual rights as a society progressed (which it need not necessarily do). Mantena draws attention to the practical imperial sources that Maine relied on for his epistemological claims regarding India:

The increased exposure to anthropological evidence of alternative modes of property bore an important relation to the consolidation of overseas empires and systematization of channels of information (in the form of colonial bureaucrats’ reports). The administrative imperatives of expanding empires, in terms of rationalizing modes of rule, confronted alternative economic and landholding systems most dramatically (130).
After Maine’s *Ancient Law* and later writings, imperial administrators had a new language for reformulating native governance ‘to correlate the form of property with the historical stage of the society in question’ (131). For Indian village-communities (and similarly situated native societies) in the ‘traditional’ stage of progress, it became imperative to stabilise communal property and segregate it from ‘modern laws’, or risk the social disintegration that led to the 1857 Rebellion.

Ancient Rome and contemporary India were the same, at least in Maine’s historical jurisprudence, since they shared a common origin in the legal form of the patriarchal family and potentially the same teleological end as a sovereign state legislated by a rational aristocracy. Over time, as early kinship groups (be they Hindu, Roman or Germanic) settled on a discrete territory, Maine believed communal land was first divided into village, arable and common lands, each with a different set of local rights. English and other progressive societies had further evolved to hold land as individual property. His study of the Hindu joint-family transmuting into the Indian village-community thus revealed, as Mantena emphasises, ‘the transition from kinship to locality as the source of social and political obligation’ (133). In a parallel arc of civilisational progress, a tribal chief took personal control of land, which eventually evolved into an exclusive territorial sovereignty. In a specific example, Maine pointed to the Roman distinction between *res mancipi* and *res nec mancipi*, as things hard to sell (especially land) and those easy to sell. As land became increasingly easy to alienate when the former category was absorbed by the latter, people began relating to each other, not as kinfolk, but strangers in a marketplace. So for Maine, the tendency towards private property was natural, and so inherent in patriarchal families. His idea of progress as a natural teleology imbued the aristocratic British state with a normative legitimacy distinct from that of Austinian sovereignty.

Yet his teleology of progress was by no means an inevitable historical process since Maine believed the Indian village-community was dissolving into chaos as their British rulers under the influence of liberal imperialism had compelled its transition from traditional to modern at too fast a pace (138). Mantena quite rightly situates Maine’s concern in the context of fiscal debates regarding revenue collection: the overriding day-to-day concern of British administrators was how to make the empire pay for itself. The Settlement Officers of the East India Company tried to create a legal regime to protect property rights, which did not exist in the form of codified rights relating to discrete land ownership. Maine targeted this as a fool’s errand that created a new land law for India *ex nihilo*. By inventing individual property rights to replace the complex matrices of communal obligations forming village-communities, the new law threatened the ‘dissolution’ of these social forms without anything but brute force to ward off anarchy. British rule had so disrupted ancient laws, he believed, that any grand schemes to reform land law on the basis of these old customs was bound to fail. While Maine sought pragmatic solutions to pressing problems, others were inspired by his insights to construct idealised communal land tenure laws for ‘peasant’ societies in India. As imperial administrators increasingly deferred to ‘custom’, Mantena concludes they abandoned or marginalised the liberal
imperial idea of native society as ‘a blank slate upon which one could recreate English institutions’ (147).

In her final chapter, Mantena reconnects Maine’s idea of traditional society in ‘crisis’ to the pragmatic ideology of ‘indirect rule’ developed by imperial administrators in India and later transported elsewhere in southeast Asia and Africa.15 If the 1857 uprisings were due to an epistemological failure of imperial rulers, as Maine believed, then the solution was to re-found native governance on anthropological and sociological studies of native society. Mantena argues that imperial administrators appropriated Maine’s ideas, especially his warning of native society in crisis, to fashion pragmatic solutions to shore up the institutions and customs of Indian village-communities (151). The ideology of liberal imperialism relied on the epistemic knowledge generated by Orientalist scholars using Brahminic informers and Sanskrit texts. The barbarity of the Code of Manu and other texts thus justified moral transformation through imperial rule. Maine believed that this distorted the view of ‘real India’, as the Rebellion had proved, and so he relied instead on ‘colonial settlement reports, district gazetteers, and annual adjustment reports, by far the most precious sources of colonial knowledge’ (155). Studying these texts would help recreate the nature of traditional society – the village community in India – that was under attack by the misguided policies of liberal imperialism.

Maine’s ideas were simple and general, and quickly diffused through the empire. Maine himself was largely responsible, by drawing on his rhetorical skills developed in magazines to write books in his distinct, deliberately popular style. From the 1860s on, his works became recommended readings for the Indian Civil Service entry exams. He also taught many future imperial bureaucrats at Oxford, Cambridge or the Inns of Court. Mantena concludes with careful studies of how Maine’s ideas were adopted and adapted by key administrators from Ibbetson, Tupper and A. C. Lyall in India, onwards to Swettenham in British Malaya, Gordon in Fiji and Lugard in Nigeria. At the end of the long nineteenth century, as the British empire reached its territorial climax, nearly all subjects in Asia and Africa were ruled by the imperial ideology of indirect rule inspired by Henry Maine.

JURISPRUDENCE AFTER EMPIRE

When H. L. A. Hart revitalised the positivist impulses of analytical jurisprudence in *The Concept of Law* (1961), little remained of the British empire: India was an independent republic for just over a decade, and the African colonies had followed from 1957 onwards.16 Hart’s critical reformulation of Austin did not dispense with his universalist claims. But Hart did characterise his project as ‘descriptive sociology’, which inspired a persistent critique from those we might

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15 Mantena uses ‘indirect rule’ broadly to describe all the policies derived from the ideology of late imperialism to govern natives in Asia and Africa.

call the sociolegalists. In a seminal article, Sally Engle Merry set out the five key claims of a truly sociological study of law in contradistinction to legal positivism: (i) a move away from the ideology of legal (state) centralism; (ii) a ‘shift away from an essentialist definition of law to an historical understanding’; (iii) exposing the ideological nature of law in forming society; (iv) a shift from focusing on rules of disputes towards every day, undisputed normative orderings; and (v) a dialectic analysis of resistance through other normative legal orders to (the ideology of) state law. What is most striking about this list is how closely it seems to parallel the core tenets of Maine’s historical jurisprudence. The sociolegal challenge to state law reproduces, except for its analysis of resistance in (v), Maine’s challenge to analytic jurisprudence. If Hart had summoned up the ghosts of Bentham and Austin to state his legal positivism, then the sociolegalists were unwittingly haunted by the spectre of Sir Henry Maine.

Yet Maine is rarely mentioned in sociolegal critiques, let alone acknowledged as an intellectual ancestor. This is a strange blindness on behalf of the sociolegalists since they are exploring the same genealogies – of customary law, communal property, and ‘traditional society’ especially – as Maine, but from the opposite direction. Merry argued that as colonial rule expanded in India and Africa from the late nineteenth century onwards, indigenous laws were appropriated into the system of rule as ‘customary law’, often by administrators applying the texts of early anthropologists. Mantena relies on many of the same sociolegal histories that Merry cites to link Maine’s thought to indirect rule as exemplified in Lyall and Lugard. Mantena lets us see how Maine’s ideas were appropriated by imperial administrators to fashion an ideology of late imperialism to serve as an alibi of empire. Everyone in the Indian Civil Service had read or knew of *Ancient Law* and their practices reflected its insights (however much they distorted Maine’s intentions). This transition from liberal imperialism was personified in Frederick Lugard. Born in Madras and raised in England, he returned in the 1880s to fight in Afghanistan and Burma, as well as Sudan, before a long African career culminating in governing the Nigerian protectorates. Lugard was one of many British officials administering colonial laws over imperial subjects, yet he took the trouble to publish a defence of the practice of indirect rule. As African colonies became self-governing states, most of the new governments led by modernised local elites decided to retain much of the structure of indirect rule. While Africans performed the acts of citizenship, like

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17 It is no coincidence that a disproportionate number of leading scholars identifying with, or sympathetic to, the sociolegal critique come from, or have worked in, postcolonies – Upendra Baxi in India, Martin Chanock and William Twining in Africa, and Sally Engle Merry and Boaventura de Sousa Santos in the Americas.


20 Cocks went looking in the wrong places for the ‘reception’ of Maine’s jurisprudence. He traced Maine’s influence in (i) historical jurisprudence, (ii) sociology, (iii) anthropology, (iv) American legal realism, and (v) ‘English jurisprudence’.

electing representatives to legislatures, most were governed under colonial-era customary law regarding inheritance, property and other important matters.

Lugard’s *The Dual Mandate* (1922) is the touchstone of many sociolegal studies in Africa. Ranger was among the first to criticise his claim that ‘customary law’ had codified the authentic laws of ‘traditional’ societies. The critique of ‘custom’ as an invented law was deepened in detailed studies by Moore and Chanock. The excess of inverted commas is necessary to capture these studies’ sense of ideological unmasking as a necessary first step in ‘decolonising’ post-colonial polities. Once the codified African ‘customary law’ was seen as a relic of colonial rule, the question was how to recover or liberate the suppressed indigenous normative orderings. More subtle treatments have shown that there is no pure law to revive since pre-colonial normative orders were not static, but constantly contested and changing over time. The question then is whether and how to liberalise the substance of customary law to make it consistent with constitutional democracy. Regardless of what is to be done with customary law, the sociolegalists have shown it to be central to political modernity in African postcolonies. Mamdani has argued persuasively that the distinctive form of the (African) postcolony today is a bifurcated state where a minority enjoy liberal civil rights (once reserved for Europeans), while the majority are governed under a regime of ‘customary’ law. The institutional and legal inheritance of indirect rule is thus not so much a burden which must be shed (though it is certainly problematic), as it is the particular form of political modernity in Africa (and we might add India).

What is missing in these valuable studies, however, are introspective genealogies of their subject matter and methodology, respectively. First, the subject of most sociolegal studies in the postcolonies was created or invented by imperial officials inspired by Maine’s ideas. All the studies above take as their starting point the particular legal instruments of indirect rule enacted by imperial or colonial officials. Their ideological commitments are either unquestioned or considered as expressions of a generalised European imperialism. Mantena shows the distinctive form of late imperialism as a metropolitan reaction by conservative elites to catalytic events like the Indian and Morant Bay rebellions. In a way, Maine’s decision to take non-European legal orders seriously as law forged the intellectual tools that imperial administrators used to manipulate ‘custom’ in far more subtle and invasive manner. Second, the sociolegalists share Maine’s commitment to taking ‘society’ as the site of law. The sociolegalists take as their subjects for critical analysis those categories, like customary law, that were

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created, as Mantena shows, by imperial administrators applying Maine’s ideas. However, their method as outlined by Merry is broadly based on the same questions as Maine’s historical jurisprudence. Both define their method, in contradistinction to analytical jurisprudence, as decentring the state, historicising law, grounding law in society, and describing normative social orderings. Of course, Maine’s approach was also very different from that of the sociolegalists, infused as it was by peculiarly Victorian notions of scientific method and progress. Nevertheless, the common concerns, methods and assumptions are no mere coincidence. The sociolegalists attacked the claims that ‘customary’ law was somehow ‘natural’ with the same set of questions that framed Maine’s critique of analytical jurisprudence. These complicated genealogies of subject and methodology suggest that sociolegalists should explore their roots in Maine’s critique of Bentham and Austin.

While Mantena frames her study as a contrast of two ideologies of imperial governance, it is worth noting their similarities and continuities. ‘[A]nalytical jurisprudence,’ she notes in passing, ‘constructed a philosophy of law well suited to an age of legislation; indeed it worked to legitimate the normative underpinnings of modern sovereignty’ (116). She goes on to show how Maine’s historical jurisprudence was well suited to an age of customary law, and worked to legitimate the normative basis of late imperialism. The Victorian idea of ‘progress’, vague as it might be, was an important element shared by analytical and historical jurisprudence of nineteenth century. Chakrabarty reminds us that J. S. Mill made the historicist argument that self-rule was the highest form of government, yet denied it to Indians, Africans and other barbarians who were not yet civilised enough.26 Maine’s idea of progress drew a firm conceptual distinction between traditional or modern societies, which Mantena rightly sees as a key aspect of his thought. Yet this perpetuated Mill’s historicism since it took contemporary European forms of government as the end of his teleology of progress. If analytical and sociolegal jurisprudence today have historical roots in liberal and late imperial ideologies, respectively, then we might ask whether this historicism of progress has survived.27 In an obvious sense, it has not since few people believe European models of law are seen as the ‘end of history’. Yet jurisprudence uses concepts of law that have their own deep, parochial histories in European thought. Historicism pervades legal thought today by trying to include or exclude normative social orders in postcolonies through an analysis of their accord with the contested but universalist concept of law. By framing her task as an intellectual history of imperial ideologies, Mantena helps to make this historicism visible, and thus opens up new possibilities for further research into

Maine that might help bring analytical and sociolegal analytic jurisprudence into a more productive engagement.28

**LEGAL HISTORIES OF THE IMPERIAL CONSTITUTION**

In the last years of his short life, Maine was preoccupied with democracy. His articles for the *St. James’s Gazette* and *Quarterly Review* covered questions like ‘How the Jacobins Conquer a Nation’, ‘The Past and Future of Democratic Government’, and ‘The Prospects of Popular Government’, a collection of which were published as *Popular Government* (1885). Maine expressed the fears of conservative elites regarding democracy by arguing, along the lines of his old friend J. F. Stephen in *Liberty, Equality, Fraternity* (1874), that demagogues would usurp democratic government and usher in socialism or even revolution.29 Nevertheless, in 1884 the Westminster Parliament passed the third and final of the great democratic reform acts of the nineteenth century.30 This law further rationalised and lowered the election qualifications to a single, uniform model based on low property or wage qualifications for British men. Three years on, London was neither in the grip of socialism nor ablaze with revolution. Maine’s reputation suffered and he retreated to Cambridge to take up the Whewell Professorship of International Law. It was his young colleague, F.W. Maitland, who best summed up the triumph of democracy in reforming the English constitution in a lecture for the Law Tripos in the same year: ‘The ancient idea of the representation of communities [. . . which] constantly act as wholes, and have common rights and duties, has thus given way to that of a representation of numbers [of men.]’31

If Britain had moved from a corporatist aristocracy to an individualist democracy, the constitutional evolution of the empire was less simple.32 When Seeley set himself the task of examining ‘historically the tendency to expansion which England has so long displayed’, he divided his lectures in two along a ‘natural’ division between those people ready for self-government and those not yet ready.33 The first were what he called ‘Greater Britain’, including the United Kingdom and the settler colonies of Canada (and Newfoundland), the Australian

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28 Mantena’s own work suggests one way by considering how Gandhi took Maine’s idea of the village-community to formulate his corporatist critique of the colonial state: ‘On Gandhi’s Critique of the State: Sources, Contexts, Conjunctures’ *Modern Intellectual History* [forthcoming]. This approach has been facilitated in legal studies by William Twining in his edited collection of four African and Indian scholars: *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na’im, Yash Ghai and Upendra Baxi* (Cambridge: Cambridge UP, 2009).

29 Maine was not of an aristocratic family, much like his fellow conservative Edmund Burke. Self-conscious of his humble origins on the Scottish borderlands, Maine kept his origins mysterious except to stress the ‘Sumner’ in his name, given in honour of his godfather, Reverend John Bird Sumner, later made the Archbishop of Canterbury in 1848: Feaver, n 2 above 5.

30 Representation of the People Act, 1884, 48–49 Vic, c 3; Representation of the People Act, 1867, 30–31 Vic, c 10, ss 3–6; Representation of the People Act, 1832, 2–3 Wm IV, c 45, ss 18–20 and 27. See also Municipal Corporations Act, 1835, 5–6 Wm IV, c 76.


32 The one constitutional constant in Britain and the empire was its patriarchal nature.

and New Zealand colonies, Cape and Natal, as well as the West Indies. The second group included India and all other dependencies. Mantena agrees with Seeley’s distinction between self-governing and dependent colonies:

From the Durham Report, which granted Canadian colonies some measure of autonomy, settler colonies such as Australia, New Zealand, and South Africa had been placed on a reformist path of increasing self-government. At the same time, for colonies with overwhelmingly nonwhite populations, the opposite trajectory – the permanent delay or denial of representative institutions – was developing into the accepted norm (54).

Mantena sees this as a racial division – white v non-white – mapping onto discrete territories. (Mantena, like Seeley and Charles Dilke before him, explains away the ‘natives’ in the settler colonies as ‘eradicated and/or radically marginalised’.34) When the grand liberal experiment in Jamaica collapsed into bloody repression, its British elite traded ‘classless’ self-government for imperial dependency. From this point the settler colonies developed their British ‘legal and political institutions’ into independent Dominions, while in the ‘non-white’ colonies ‘it was in the long process of political and administrative innovation in response to the dilemmas of ruling alien subjects that British rule in India took on a unique experimental character.’ For Mantena the bloodshed at Morant Bay appeared to underline a constitutional division that would harden over the decades when ‘Greater Britain’ emerged as independent Dominions and ‘indirect rule’ stunted the growth of the Asian and African dependencies.

Mantena is hardly alone in accepting Seeley’s distinction as the key to explain the evolution of the imperial constitution. In the aftermath of decolonisation, Pocock called for a ‘British history’ that would encompass the settler colonies of the British empire.35 James Belich and Duncan Bell, among others, have shown that Seeley’s ‘Greater Britain’ arose in the 1880s and ‘was big and powerful in its day, a virtual United States, which historians of the period can no longer ignore, nor dismiss as a failed idea.’36 Legal historians have also answered Pocock’s call with detailed comparative studies of discrete legal subjects like property and marriage.37 Recent scholarship has also examined ‘aboriginal’ or ‘indigenous’

34 This is a common view: see eg B. Cohn, Colonialism and Its Forms of Knowledge: The British in India (Princeton, NJ: Princeton UP, 1996) 57.
37 H. Foster, B. L. Berger and A. R. Buck (eds), The Grand Experiment: Law and Legal Culture in British Settler Societies (Vancouver: UBC Press, 2008); J. A. McLaren, A. R. Buck and N. E. Wright, Despotic Dominion: Property Rights in British Settler Societies (Vancouver: UBC Press, 2005); D. Kirkby and C. Coleborne (eds), Law, History, Colonialism: The Reach of Empire (Manchester: Manchester UP, 2001) [although chap 15 (of 17) includes a case study of the Krishna river basin in India].
rights in the settler colonies. All these studies reinforce the constitutional unity of the settler colonies ‘emerging’ as distinct Dominions, in contrast to India and the African colonies ‘winning’ or ‘being granted’ independence. ‘Indirect rule, the rule through native institutions,’ Mantena reminds us, ‘would be hailed as the unique and defining principle of British imperial rule in Asia and Africa’ (55). She cites approvingly Low’s argument in Lion Rampant that the new forms of rules developed in India at the end of the century were then transplanted in south-east Asia and Africa. The sociolegal studies mentioned earlier also rely on an assumption that the Asian and African postcolonies are similar to each other, if only in their difference from the United Kingdom and the settler colonies. Explicit trans-continental studies are scarce, but area-specific studies consider a common subject – often communal property or customary law – that is distinctive of the state that ‘broke free’ from British imperial rule. The enduring idea that this scholarship, including Alibis of Empire, perpetuates is that of an imperial constitution territorially bifurcated into the settler colonies with representative institutions, and India and the African dependencies ruled despotically.

I will briefly sketch another idea of the imperial constitution that is both non-territorial and takes seriously the (supposedly) forgotten ‘natives’ of the settler colonies by way of two examples regarding property and franchise laws. First, consider the ‘great reversal’ of agricultural policy in India when earlier liberal ideas of individual private property rights gave way from 1880 onwards to new laws retrenching a communal notion of property shielded from market transactions like sale, lease or usury. In Canada, the Cree, Blackfeet and others in the newly acquired prairie territories were first subjected to an intensive program to transform them into progressive farmers by subdividing their new reserves into individual lots to be worked by nuclear families. After the North-west Rebellion of 1885, the Canadian officials adapted the language of indirect rule, which stressed the resistant nature of traditional society, to amend the Indian Act to hinder mortgages, leasing and other market transactions with the settler economy. A similar reversal in the Cape saw optimistic plans to civilise natives through surveying lands to grant private property rights in the newly annexed Transkeian territories give way by 1890 to the creation of inalienable communal tenure. Cape bureaucrats no longer saw Africans as capable of rapid progress, and instead used laws to segregate them from their settler neighbours. In short, there are notable parallels in the property law reforms for ‘natives’ in India and

39 Examples of such legislation include the Deccan Agriculturalists’ Relief Act (1879), Bengal Tenancy Act (1885) and Punjab Alienation of Land Act (1900): C. Dewey, ‘The Influence of Sir Henry Maine on Agrarian Policy in India’ in Diamond (ed), n 4 above 355.
settler colonies in Canada and the Cape. In all instances, native administrators in the settler colonies adapted the language of late imperial ideology by the 1880s to address local problems – especially settler access to scarce, prime agricultural land – by legislating their own ‘great reversal’ of mid-century liberal policies to assimilate ‘native’ land.

If access to land was the most pressing material question in the empire, its political corollary was the right to participate in representative institutions of governance. Mantena traces Maine’s influence in the Indian Civil Service, especially over Lyall, who would delay and then abandon the earlier liberal goal of assimilating educated natives into representative councils. The exclusion of natives from political institutions is even more striking in the settler colonies, which all had ‘classless’ enfranchisement laws when they were granted responsible government. In Canada, all Indian men living on reserves (in the older provinces) could qualify to vote in Dominion elections if they met the same low property test as their settler neighbours. But this provision was revoked (disenfranchising nearly all registered Indian voters) in 1898 on the grounds that Indians neither appreciated nor understood the franchise. The famous ‘colour-blind’ Cape franchise was likewise dismantled in a series of reforms from 1887 to 1892, which disenfranchised nearly all African men. The principal method to exclude African men was to define land held on locations or reserves, where a vast majority lived, as ‘communal’ tenure that did not count towards the higher property test. In New Zealand, the Maori Representation Act of 1867 set up distinct Maori representatives elected to the colonial legislature, but also allowed Maori men who met the general property qualification the alternate option of registering to vote in the European electorate. In 1896, the legislature abolished the Maori right to vote for these European seats. By 1900, nearly all non-whites in the settler colonies were excluded from representative institutions of governance and instead ruled indirectly through councils administered by a dedicated government department. Maine may have failed to stem the seemingly natural progress of British politics from a ‘corporatist’ aristocracy to an ‘individualist’ representative democracy, but his ideas did influence a late imperial ideology that excluded natives from the new individualist politics on the corporatist grounds that they were unready as traditional societies for representative government.

In a sense, Mantena’s bold claim for the transformation from liberal to late imperial ideologies is not bold enough. Despite her key argument linking


Maine’s thought to the origins of indirect rule, she retains the essence of Seeley’s notion of a territorially-bifurcated empire. Yet her own argument makes clear that Maine’s distinction was not based on race (white v nonwhite), but on progress (traditional v modern). If we take this as the key idea of late imperial ideology, then indirect rule is not ‘the unique and defining principle’ of British governance in India and Africa. The simultaneous disenfranchisement of natives in the settler colonies just outlined suggests that this new ideology of governing nonwhites diffused throughout the entire empire at the end of the nineteenth century. *Alibis of Empire* shows that the late imperial ideology at the end of the nineteenth century reformulated the principles upon which political status was determined. First applied in India, this ideology provided a new vocabulary for British men administering subject populations. The simultaneous ‘great reversal’ of private property rights for native populations (and franchise rights for those in settler colonies) across the empire in the last decades of the nineteenth century is neither mere coincidence, nor explained away solely by new, more virulent scientific racism. The new studies of Greater Britain help us better understand that the ‘British’ men of the settler colonies increasingly either identified as British or were actually recent immigrants from the United Kingdom. With no obvious cases of legal ‘transplants’, either doctrines or texts, the question remains how imperial ideologies diffused (if at all) across the networks to inform the actions of colonial administrators.

*Alibis of Empire* and comparative legal historiography of the empire largely assumes and so reproduces the dubious Seeleyan distinction, but Mantena’s own arguments suggest possibilities to reconsider the imperial constitution. Her use of imperial ideologies is limited to a relatively small group of exclusively British men in positions of academic, political or administrative power, while the middle officials and ‘native’ leaders, actors who contested and cooperated each day across the empire, are passed over in silence.46 She is too quick to dismiss Gallagher and Robinson’s theory that the empire was the sum of many localised struggles. Maine himself argued for shifting the epistemological basis of governance from Sanskrit texts to official government texts, associated with liberal and late imperial ideologies respectively. The latter texts are especially valuable, as postcolonial studies have revealed, as archival sources of the contested and often confused translation of ideology into action.47 Moreover, as Maine’s own work demonstrates, these archives are not only imprints of applied ideology, but are also the empirical facts that are organised by ideologies. A compelling imperial history of constitutions must weave together imperial ideologies, as Mantena’s work makes clear, and localised histories of ideologies-in-action captured in the epistemological texts of imperial governance. While imperial ideologies formed the horizon of these myriad of interactions as they diffused through imperial networks, these accumulated micro-events simultaneously formed the new epistemic sources of imperial rule to reshaped that

very horizon. Historical anthropology offers an opportunity for ‘thick’
descriptions of law-in-action within a discrete, localised subject – a village,
family or individual. Since the archival sources of these local histories are
predominantly legal – eg statutes, regulations, law reports or magisterial
decisions – legal historians are well-placed to help ‘provincialise’ histories of
empire by enriching imperial ideologies with the quotidian events that consti-
tuted the British Empire.

CONCLUSION: PROVINCIALISING HENRY MAINE

Alibis of Empire is a compelling study of Henry Maine’s scholarship and its
influence in displacing the ideology of liberal imperialism with a late ideology
caracterised by indirect rule. Maine’s ideas of ‘traditional society’, codification
and especially property worked to undermine consensus on the moral mission of
empire that justified liberal imperialism. While he might not have agreed with
how his ideas were fashioned into a defence of indirect rule, Karuna Mantena
makes a strong case that they fundamentally reconstituted the British Empire.
Legal scholars with an interest in Bentham and Austin can no longer ignore or
dismiss Maine’s jurisprudence. Mantena’s work, read with that of Cocks and
Feaver, is the essential starting point for reconnecting Maine with the history of
Anglo-American legal theory. But Alibis of Empire demands a much wider
readership. Maine’s strange status as initiator of the sociolegal critique of analytic
jurisprudence and inspiration for indirect rule requires further exploration. His
use of history, always uncomfortable for legal scholars, is also a unique contribu-
tion that cuts to the historicist heart of jurisprudence today. Mantena also raises
questions about the nature of the imperial constitution. Was the post-1857
empire really divided territorially into self-governed settler colonies and the
non-white lands of Asia and Africa ruled despotically? Did the move from liberal
to late imperialism correlate with a reconstitution of empire? If it did, on what
basis did empire reform the governance of its subjects? What is certain is that
these questions worried Henry Maine, and should still concern us today.

48 Twining has explored the idea of diffusion informed by recent sociological work as a richer
alternative to that of ‘legal transplants’: W. Twining, ‘Social Science and Diffusion of Law’ (2005) 32
of Legal Pluralism and Unofficial Law 1. For a study of how ideas (or ideologies) diffuse across imperial
networks, see A. Lester, Imperial Networks: Creating Identities in Nineteenth-Century South Africa and

49 Clifford Geertz explores his idea of ‘thick description’ as it relates to legal anthropology in his essay
‘Local Knowledge: Fact and Law in Comparative Perspective’ in Local Knowledge: Further Essays in
Interpretive Anthropology (London: Fontana Press, 1993); C. Ginzburg, ‘Microhistory: Two or Three