CURRENT LEGAL ISSUES 2003
Volume 6

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OXFORD UNIVERSITY PRESS
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LAW AND ‘TRADITION’: HENRY MAINE AND THE THEORETICAL ORIGINS OF INDIRECT RULE

Karuna Mantena*

1. Introduction

This paper takes as its focus a central interpretative paradox in relation to Henry Maine’s famous account of the historical movement ‘from Status to Contract’. On the one hand, Maine’s conception of the expansion of the sphere of contract as the pinnacle of civilization can be characterized as a celebration of laissez-faire liberal individualism, just as the era of classical liberalism was coming to a close. On the other hand, Maine’s work on primitive law and custom can also be viewed as presenting an idealized portrait of traditional communities. Moreover, considered from the vantage point of colonial history, Maine stands in line with a different and indeed opposite historical trajectory—the conscious retreat from expansion of freedom of contract and private property with the consolidation of ‘customary’ law under the rubric of ‘indirect rule’. The answer to this paradox of how Maine can be seen as simultaneously a defender of both custom and contract is both a theoretical and historical one. Theoretically, I will argue, there is a central ambiguity in Maine’s account of custom and pre-contractual society that lends itself to these widely divergent readings; historically it is this ambiguous portrayal of native or primitive society that underpinned the shift to forms of indirect rule in the latter half of the nineteenth century.

This paper, thus, will first explore those theoretical aspects of Maine’s work which proved particularly fruitful to a new intellectual trajectory that laid the foundation for indirect rule. The first section will analyse the theoretical basis of Maine’s account of primitive society as it emerges from his account of status and contract, his critique of utilitarianism, and his use of the comparative method. In Maine’s work, as primitive society is negatively contrasted to modern society, it emerges as a functionally coherent, rational whole, with the capacity for self-perpetuation. The next section will then consider how this holistic account of native society is sharpened

* I would like to thank Rama Sundari Mantena, Sunil Agnani, and Pratap Bhanu Mehta for their invaluable suggestions and criticisms on an earlier draft of this paper.

1 For example, Maine’s celebrated account of the Indian village community had an important political and theoretical impact on the work of M. K. Gandhi. See the appendix to Hind Swaraj (Anthony Farel (ed.), Cambridge, 1997) and The Collected Works of Mahatma Gandhi (Delhi, 1958), Vol. I, III.
and complicated by Maine's analysis of the impact of modern society on native institutions under the rubric of modern colonialism. In Maine's sociology of colonialism, as it were, the bases of native society are seen as increasingly undermined by contact with the modern.

Combined, these features worked to characterize native society in terms of an opposition between the modern and the traditional, dramatized as an immanent conflict between two determinate forms of life. On the one hand, native society was rendered a conceptual whole, a functional totality with its own logic of reproduction and stability. On the other hand, despite the internal coherence of native institutions, this structural integrity was construed as fragile and increasingly threatened under modern conditions. Indirect rule was, in part, premised upon this holistic vision of native society as both functionally intact and vulnerable to imminent dissolution.

The final section will look at the specific ways this double-sided image of native society was mobilized in the context of colonial policy. In exploring the intellectual basis of indirect rule, I seek to call attention to Maine's position as a central intellectual figure in the transcontinental shift to indirect rule as the keystone of late-imperial policy across Asia and Africa. The impact of indirect rule was central in instituting specifically postcolonial modes of state formation. In this way, Maine's legacy figures importantly in the forging of a particular state-form, perhaps the archetypal form for Asia and Africa, where legitimacy is both premised upon and constituted through the authority to authentically interpret 'tradition'.

2. The Nature of Primitive Society

Published in 1861, Maine's best known treatise, Ancient Law, elaborated the evolution of legal ideas as a movement 'from status to contract', terms that would become paradigmatic to understandings of the transition from 'traditional' to 'modern' society. In tracing the development of law from its classical foundations to modern manifestations, Maine harnessed a remarkable array of historical and anthropological sources, combining and juxtaposing contemporary research on the legal practices of ancient Greece, Rome, and India with the trajectories of modern European law. The immediate success of Ancient Law was a testament to Maine's ability to distil from these various sources compelling formulations of the differences between 'stationary' and 'progressive' societies.2


Henry Maine and the Theoretical Origins of Indirect Rule

Status to Contract: Rewriting the Origins of Civil Society

In Ancient Law Maine famously dramatizes the historical transition to modern law in the following terms:

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 the 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. [W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.3

As Maine's most enduring theoretical insight, the dictum, from Status to Contract, announces a law of progress whereby 'the individual is steadily substituted for the Family, as the unit of which civil laws take account'. And, '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...is Contract'.4 For Maine, expansion of the sphere of contract is here concommittant with the growth of 'civilization', a process whose central dynamics is reflected in the integrated development of the law of persons and property. In substantive terms, the endpoint of civilization is the establishment of separate spheres of private property, freedom of contract, and individual right.

The 'Family' from which Maine believes our modern conceptions of rights and duties are distilled, or more precisely disentangled, is not the 'natural' nuclear family, but rather the particular constellation of kinship and power embodied in the Patriarchal Family. The ancient patriarchal family is a corporate group, organized under the archaic jurisdiction of patria potestas, the despotic (unchecked) power of the patriarch over dependent persons and property. Ancient law appears in the interstices between families, determining their mutual rights and duties and never straying into the parameters of the householders' uncontested jus vitae necisque (right of life and death) over dependants.

Although Maine deliberately invokes Robert Filmer in arguing for the primary fact of the patriarchal family in the history of society, he relies on Roman examples to illustrate its key features. In contrast to Filmer's patriarchal theory, in which the relations within the patriarchal family mirror the sovereign's relation to his citizens, for Maine, the analogy runs in the opposite direction.5 Rather than sovereignty expanding outward from the


4 Maine, Ancient Law, n. 3 above, 163–5.

5 Sir Robert Filmer, the seventeenth-century defender of absolute monarchy, is most famously remembered as the central antagonist of Locke's First Treatise. For Filmer, sovereign power was in essence a fatherly authority that, as in the case of the first patriarch Adam, was drawn, not from the consent of his subjects/descendants, but from God. See Filmer, Patriarcha and Other Writings (Johann P. Sommerville ed.), Cambridge, 1991.
pattern of rule within the family, in Maine’s account, households are rather
construed as little kingdoms.6 Furthermore, the trajectory from ancient to
modern society is one in which this patriarchal power gradually loses it
hold over its dependants (it becomes more and more circumscribed by
public law), and independence steadily confers the entire set of rights of
duties of the family onto individual persons. Whereas ancient law con-
sisted of a system of rights and duties between sovereigns understood as
families, in modern law, individuals relate to one another as little sover-
eigns.

This archetype of the ancient family also functions as a dramatic coun-
terpoint to, and critique of, speculative theories about the origins of soci-
ety. In this vein, Maine’s analysis of the movement ‘from status to contract’
rests upon a fundamental reinterpretation of the origins of political society.
Contra social contract theory, Maine proffered his revised account of the
early history of institutions as a necessary corrective to the abstractions ofationalist, deductive political theories, which reasoned from an account of
‘natural’ man in an original ‘state of nature’ (and here Maine’s chief
target is Rousseau). According to Maine, philosophical speculations about
the so-called ‘state of nature’ tended to project ‘the sentiments and preju-
dices’ of the modern individual backwards in time.7 In doing so, these
theories became tautological; they took for granted exactly what was in
need of explanation, namely the logic and sequence of the historical evolu-
tion of ideas, institutions, and practices that lead to the very possibility of
individual contract. Deducing the origin of society from individual moti-
vation was premised, for Maine, upon a basic misconception of both the
historical process as well as the actual nature of ancient society. For as
Maine argued, ‘Ancient Law knows next to nothing of Individuals’;8 rights
and duties are exclusively conferred upon corporate family units, not indi-
vidual citizens. Thus to rationalize ideal political arrangements through a
logical deduction from individual motivation is to risk radical political
conclusions at the expense of historical judgment. What made the atten-
tion to history so necessary was the underlying claim that man as such was
a historical animal, a creature of habit and custom whose very mode of
being was the achievement of the long institutional history of civilization.
Contract as the precarious accomplishment of progressive societies was
not a logically given conclusion to the story of mankind (indeed progressive
societies were historically exceptional).9

Throughout his work, Maine exhibited a consistent scepticism toward
arguments which employed notions of original or inherent tendencies of

6 Thomas Trautman, Lewis Henry Morgan and the Invention of Kinship (Berkeley,
1990), 126.
7 Maine, Ancient Law, n. 3 above, 254.
8 Maine, Ancient Law, n. 3 above, 250.
9 Maine, Ancient Law, n. 3 above, 22–3.

humankind as explanations for the origins of institutions. Appeals to indi-
vidual ‘instinct’ or motive are not only questionable because of their reli-
ance on the ‘individual’ as the unit of analysis but also because of a basic
sociological premise, namely that individual action and habitual behaviour
are forged vis-à-vis institutional change.

Even the primeval patriarchal family is, for Maine, a highly artificial
construction; ‘there is nothing in the superficial passions, habits, or ten-
dencies of human nature which at all sufficiently accounts for it.’10 And kin-
ship, in particular, does not signify all those who are blood relations in the
simple sense, but is construed agnostically and exactly coterminous with the
jurisdiction of patria potestas. Kinship expresses in relational terms, then,
especially political configurations; all individuals who are subject to patria
potestas, who fall under the archaic jurisdiction of a common patriarchal
head are considered kin.11 Maine’s political reading of kinship also served
to tie the concepts of property, contract, and right together. In the patri-
archal family, where the space of ‘kinship’ was equivalent to the space of
power; the law of persons contained and confounded all other rights and
duties (such as those relating to property). In the transition from status to
contract, then, the paring down of kinship ties, the division of communal
property, the expansion of freedom of contract, and the progress of indi-
vidual right are all parallel processes. Transformations in one sphere are
necessarily linked to changes in another, thus stressing a holistic under-
standing of social and political relations.

The Critique of Utilitarian Jurisprudence
and Political Economy

Analogous to his criticism of social contract, Ancient Law’s introductory
chapters begin as refutations of the universal applicability of utilitarian
definitions of law, as put forward in the work of John Austin, Bentham’s heir
in jurisprudence.12 For Austin, law involves a definite structure: a
general command issued by the sovereign lawgivers, an obligation or duty
to obey imposed upon the citizen, the threat of force or sanction for
disobedience, and finally the referral of a right to seek sanction in the case
of breaches of duty.13 Maine considered this conception of law appropriate
for understanding law in its highest stage of legal development, and

10 Henry Sumner Maine, Village-Communities in the East and West: Six Lectures
11 Maine, Ancient Law, n. 3 above, 144.
12 John Austin, The Province of Jurisprudence Determined (Willis E. Rumble (ed.),
Cambridge, 1993; 1st edn., 1832). In addition to Ancient Law, Maine’s most extended discussion
of Austin, Bentham, and analytical jurisprudence is in Chapters XII and XIII of his
13 Maine, Ancient Law, n. 3 above, 8–9; Maine, Village-Communities, n. 10 above,
67–8.
credited utilitarian jurisprudence with bringing clarity to English legal concepts. Understanding the early history of legal forms, however, could not begin on the same terms. For Maine, these terms themselves assume the prior historical establishment of the institutional conditions of modern legal universality, i.e. the development of the modern bureaucratic state and the principle of territorial sovereignty.

In Maine's account, in contrast to the generality that modern law evokes, early law began with particular decrees, which slowly expanded into sets of customary observances. While the first stage of law indeed began with the commands of a ruler, these commands were 'arbitrary' in the sense that their legitimacy was without reference to universal norms. The next era, the epoch of customary law took shape as an aristocratic class emerged and monopolized knowledge of traditional rules, themselves constructed from accumulated sets of practices. When these rules were formulated into ancient codes the transformation of custom was frozen into a set of prescriptions, thus, ending the spontaneous development of law. The manner and timing in which societies realized these ancient codes, 'at what stage of their social progress, they should have their laws put into writing', profoundly affected the possibility of subsequent legal progress; successful codification, then, was the criterion that initially divided the world into 'progressive' and 'stationary' societies. Taking the long history of Roman legal development as the exemplar, Maine offered an account of subsequent legal change in 'progressive' societies which takes the form of deliberate attempts at reform 'from without'; legal fictions, equity, and, finally, legislation are the mechanisms by which codes are adapted to meet changing societal needs. Legislation, then, which in utilitarian jurisprudence is synonymous with law itself, appears for Maine at the pinnacle of legal progress.

In addition to a narrative history of legal development that undercuts the status of purely analytic definitions of law, Maine invoked evidence from alternative legal systems (historical and anthropological examples) to temper the claim to universality of utilitarian jurisprudence. For example, in his characterization of village communities, Maine highlights the inapplicability of Austrian terms to primitive systems of reciprocal obliga-

tion and conflict resolution. In the Indian village community, Maine argues, strict notions of command, sovereign, obligation, sanction, and right inevitably break down. The council of village elders does not issue universal commands, it merely declares the ancient practices that have always been. Antiquity and precedent, rather than divine or political authority, legitimate usage. There are no concepts strictly analogous to notions of individual right or duty and sanctions exist in the form of universal disapproval, without any threat of force. The main drawback of utilitarian jurisprudence, then, is less its mode of analysis of legal concepts than its tendency to unjustifiably universalize the historical conditions of modern English society, upon which these concepts are essentially premised. A similar error occurs in utilitarian political economy. According to Maine, just as the Austrian sovereign is dependent upon the modern principle of territorial sovereignty, Ricardo's theory of rent is only applicable in social systems where the rule of the market has superseded custom as the measure of price. And even more than Austin's work, political economy is a deductive philosophy, which necessarily begins by imputing a range of motivations and instincts supposedly grounded in human nature. Again the evidence from India is, for Maine, particularly useful to raise questions about both the philosophical legitimacy of such methodological imperatives as well as the practicality of applying its conclusions universally.

For Maine, the idea that human beings are naturally inclined to sell goods and services at the highest possible price is not a given fact of nature but made possible only in economic systems where the ideology of the market has taken hold. Maine describes the complex patterns of interdependence at the village level to illustrate the web of economic activities that are held together by non-market principles. In the caste division of labour, or what later anthropologists will term the jajmani system, persons are tied to one another through the performance of hereditary services in exchange for fixed appropriations of the common harvest. Even those village members who are not directly tied to the cultivation of land, such as artisans whose livelihood necessarily depends on trade or exchange, produce goods as service to the village as a whole. And when these types of exchange do coincide with payment, prices are fixed by custom rather than a market mechanism. Thus when economic fortunes fluctuate, 'the artificer who plies an ancient trade still sells his wares at customary prices, and would always change their quality rather than their price'.

14 Maine is probably best remembered as a forceful critic of utilitarianism, and indeed, most of the secondary literature inevitably focuses on this aspect in trying to summarize his work as whole. But Maine's critique of Austin and Bentham was always more nuanced than, for example, his absolute condemnation of Rousseau and the natural lawyers. His worry about utilitarianism's ignorance of history, a constant throughout his work, was also coupled with a more general admiration for the theoretical sophistication of analytical jurisprudence. Raymond Cocks has argued this point convincingly and has also shown how this understanding clarifies Maine's ideas about legal reform and codification. See Cocks, Sir Henry Maine, n. 2 above.

15 Maine, Ancient Law, n. 3 above, 15.

16 Maine, Ancient Law, n. 3 above, 1-24.

17 Maine, Village-Communities, n. 10 above, 67-9.

18 Burrow, Evolution and Society, n. 2 above.

19 Maine, Village-Communities, n. 10 above, 191.
Henry Maine and the Theoretical Origins of Indirect Rule

For Maine, the problem with political economists is that they 'generalise to the whole world from a part of it, they are apt to speak of their propositions as true a priori, or for all time'. In doing so, they greatly underrate the value, power, and interest of that great body of custom and inherited ideas which, they throw aside as friction. The best corrective which could be given to this disposition would be a demonstration that this 'friction' is capable of scientific analysis and scientific measurement. 20

Under the name of friction, political economists dismiss as extrinsic any countervailing forces that disrupt the smooth functioning of economic laws. For Maine, rather than throw these obstructions aside, one could study them in their own right and perhaps reveal the rationale and logic of an older order of ideas which may, even systematically, impinge upon market principles. The older order was one in which custom was the ordering principle such that the distinction between custom and market was equivalent to the opposition of status and contract.

In Maine's work, in this radical contrast between the sociological and historical premises of ancient/primitive and modern society, and although it is a negative contrast in the sense that modern society is always understood as morally superior, ancient society is attributed a rationale and historicity of its own. In this way, societies whether defined through status or contract relations were conceived of as functionally ordered, holistic societies in which central principles animated and connected the different sets of relations and institutions. This aspect is further clarified when we turn our focus to Maine's method.

Spatializing History: Maine's Comparative Method

Due in part to the popularity of Ancient Law, Maine was appointed to the Governor-General's Council in Calcutta, where he served as Law Member from 1862–1869. Shortly after his return to England, Maine assumed the Corpus Professorship in Jurisprudence at Oxford University and, in this capacity, delivered a series of influential lectures that extended the central arguments of Ancient Law. In the first of these, published in 1871 as Village Communities in the East and West, Maine sought to persuade his English audience of the scholarly importance of studying Indian institutions, which seemed to offer observable evidence of the workings of ancient/primitive society. The scientific study of Eastern phenomena, he argued, would amplify, correct, and potentially revolutionize our historical research (especially in respect to the heated debates around the origins and history of private property) by lifting the veil over 'the darkest passages in the history of law

20 Henry Sumner Maine, 'The Effects of Observation of India on Modern European Thought', in Maine, Village-Communities, n. 10 above, 233.

21 In 1875, at the height of his popular and scholarly reputation, Maine delivered the Rede Lecture in Cambridge, entitled 'The Effects of Observation of India for Modern European Thought'. Maine took this opportunity to continue the plea, launched most ardently in Village-Communities, for the constitution of a truly comparative social science.

The enquiry upon which we are engaged can only be said to belong to Comparative Jurisprudence, if the word 'comparative' be used as it is used in such expressions as 'Comparative Philology' and 'Comparative Mythology'. We shall examine a number of parallel phenomena with the view of establishing, if possible, that some of them are related to one another in the order of historical succession... We take a number of contemporary facts, ideas, and customs, and we infer the past form of those facts, ideas, and customs not only from historical records of that past form, but from examples of it which have not yet died out of the world, and are still to be found in it. When in truth we have to some extent succeeded in freeing ourselves from that limited conception of the world and mankind, beyond which the most civilised societies and (I will add) some of the greatest thinkers do not always rise; when we gain something like an adequate idea of the vastness and variety of the phenomena of human society; when in particular we have learned not to exclude from our view of the earth and men those great and unexplored regions which we vaguely term the East, we find it to be wholly a conceit or a paradox to say that the distinction between the Present and the Past disappears. Sometimes the Past is the Present; much more often it is removed from it by varying distances, which however, cannot be estimated or expressed chronologically. 22

The first step in this endeavour was to remove a prejudice which had prevented the English from capitalizing on their intimate knowledge of India. Continental interest in and knowledge of India had indeed been built upon the great discoveries of British administrator-scholars such as Sir William Jones, but had surpassed their English counterparts. 23 For Maine, it was imperative that England now recognize (what the rest of Europe had already come to understand) that India had given the world a new basis for comparative science.

According to Maine, with the 'discovery' of Sanskrit and the identification of an Indo-European language family, comparative philology had suggested a grouping of peoples quite unlike anything that had been thought of before. 24 It was this revolutionized understanding of the ethnological relationship between peoples that underpinned India's
epistemological centrality as 'the great repository of verifiable phenomena of ancient usage and ancient juridical thought'. India includes a whole world of Aryan institutions, Aryan customs, Aryan laws, Aryan ideas, Aryan beliefs, in a far earlier stage of growth and development than any which survive beyond its borders. And while the social state of India is 'barbarism', it is a 'barbarism which contains a great part of our own civilisation, with its elements as yet inseparable and not yet unfolded'.

India was a privileged point of entry for the discussion of ancient law and society because it represented the 'living past' of Europe. The study of contemporary Indian social and political institutions cast light upon the past history of Aryan societies and peoples precisely because Indian society was assumed to have stagnated, arresting development of institutions at an early stage, and, thus, preserving their ancient character.

The temporal dimension of Maine's comparative method, i.e. that variations in social forms could be related to 'one another in the order of historical succession', conferred on Maine's work a kind of proto-evolutionism. In this schema, we see intimations of a new spatio-temporal horizon for the comparative study of societies, where the distinction between the East and the West would be recast through the reading of Europe's historical trajectory. In later, more robust, forms of evolutionary social theory, the comparative method would become a universal framework through which Europe would be systematically related to all other social formations across time and space; every race, every culture could find its place (and anticipate its future) in the long history of civilization. Yet, in Maine's work, the universality of evolutionary theory was tempered by the Aryan or Indo-European idea, which served as the limited ontological grounding for Maine's conception of the comparative/historical study of institutions.

25 Maine, Village-Communities, n. 10 above, 22.
26 Maine, Village-Communities, n. 10 above, 211.
27 Maine, Village-Communities, n. 10 above, 215.
28 This formulation of Indian institutions as embodying the 'living past' of European social forms exemplifies Maine's move away from the static contrast of stationary and progressive societies initially put forward in Ancient Law. Indeed, in later works, Maine tended to emphasize the ways in which the Eastern and Western form of the village community may have generated from within tendencies towards feudalism.
29 I use the term 'proto-evolutionism' to signal the fact that while Maine's work certainly resonated with later forms of evolutionary theory, Maine's conception of progress was formulated in a pre-Darwinian context. In this sense, many aspects of Maine's framework, such as its time-scale, geographic range, and account of the mechanisms of progress, distinguish it from the mainstream evolutionism. For a fuller account of these differences see George Stocking, Victorian Anthropology (New York, 1987), Burrow, Evolution and Society, n. 2 above, and Trautmann, Lewis Henry Morgan and the Invention of Kinship, n. 6 above.
31 This qualification became more insistent as the rival anthropological work of Lewis Henry Morgan and John McLennan increasingly identified alternative conceptions of the primitive family, such as an original matriarchy and/or primitive promiscuity, and thus questioned the primacy of the patriarchal family as the earliest form of the family.

32 See Stocking, Victorian Anthropology, n. 29 above and Burrow, Evolution and Society, n. 2 above.
33 Although, 'status to contract' is Maine's most famous maxim, the term 'status' appears quite rarely in Maine's works; and in his later works, it disappears altogether. I would argue, however, that the opposition of status/contract continues to structure his thinking, metaphrasing into analogous binary formulations such as custom/market, and custom/contract. Moreover, it is via these alternative formulations, that the notion of 'custom' takes on a more anthropological and sociological resonance. Whereas, in the history of legal thought, custom was traditionally considered one among many sources of substantive law, in Maine's work it emerges to signify an entire legal and moral order at odds with a modern contractual and legislative system. The ideological roots of this opposition may perhaps be traced to European debates between defenders of the 'common law/customary law' and the advocates of natural law/ethical law. But in Maine's more anthropological account the difference between the two 'systems' places less emphasis on the difference in sources of law than on the interplay and embeddedness of legal norms in the total fabric of social and economic institutions.
34 Sir Alfred Lyall commented that one of Maine's great scholarly achievements was his demonstration that 'whatever may be, in the Western world, the recognizable division between ancient and modern history, it is safe to affirm that the dividing line between ancient and modern India is marked everywhere by the date at which each province of kingdom fell.
encounter between these opposed social forms necessarily leads to conflict; a conflict which inevitably hastens the dissolution of older, ancient, customary forms of life. For the colonial world, the larger theoretical picture implicitly in Maine's work, then, is less a temporalized ladder of civilization upon which all societies are placed hierarchically, than a spatial frontier where bounded societies live side by side, yet, significantly, in different temporalities. And it is this spatial vision that is instantiated in the theory and practice of indirect rule.

3. The Vulnerability of Native Society: Towards A Sociology of Colonialism

Although primitive societies were functional wholes, in Maine's terms, self-acting and self-generating, they were also, paradoxically, under the threat of imminent dissolution. The village communities, whose observation was crucial for historical reconstruction, were every day disappearing under the impact of colonial rule. Here lies the particular urgency in Maine's plea for comparative social science, for while British rule in India provided the conditions for sustained observation of these forms of ancient society, it was the very fact of that rule that was also undermining the social basis of these same archaic institutions. India must be studied at once, Maine argues, 'for this remarkable society, pregnant with interest at every point, and for the moment easily open to our observations, is undoubtedly passing away... India itself is gradually losing everything which is characteristic of it.' And while Maine insisted that this disintegration of traditional Indian society was in large part enacted unwittingly by the British, it was nevertheless a process that could not be reversed: we do not innovate or destroy in mere ignorance. We rather change because we cannot help it. Whatever be the nature and value of that bundle of influences which we call Progress, nothing can be more certain than that, when a society is once touched by it, it spreads like a contagion.

Through the metaphor of contagion, Maine articulated a prescient account of the structural impact of colonial rule on native institutions and practices. And thus, in reflecting on the process of establishing colonial rule, Maine offered a sociology of the precarious circumstances and profound consequences involved in establishing British dominion in India.

Henry Maine and the Theoretical Origins of Indirect Rule

When the East India Company acquired the diwani (the right to levy and collect taxes and revenue) of the Mughal Emperor in 1765, the Company began its unwrapping transformation into a full-fledged sovereign state. According to Maine, the transformation was 'unwitting' in the most obvious sense, that early Company rule attempted to conceal the assumption of sovereignty in a variety ways. Under the system of dual sovereignty, early colonial administrators attempted to govern through existing local institutions. In the arena of law, this meant that the settlement of disputes would be made with strict reference to native customs and usages. In this domain, one of the most significant errors on the part of the British, for Maine, was in assuming native custom was closely tied to the ancient legal texts of Hinduism, which many administrator-scholars and their Brahminical interpreters had assigned as the codified law for the whole of India. The resulting application of 'native' law had the curious effect that with British dominion the scope, power, and influence of Brahminical law actually increased. As many historians of colonial law have shown, here echoing Maine, in the administering of Hindu law, the British courts tended to privilege notions of purity which coincided with the most ancient interpretations of the code, thus producing judgments that overemphasized the religious and scriptural character of Hindu law.

Moreover, the very interaction of English legal procedure and Hindu law had a rigifying effect on Hindu law: On the eve of conquest, Hindu jurisprudence, like many of ancient legal systems, was based upon commentaries. For Maine, commentaries were vital instruments in the history of legal development, allowing laws to adjust to the changing needs of society. But the imposition of English systems of interpretation, i.e. the mode of developing bodies of law through decided cases, tended to arrest the natural, flexible development of Hindu law. This process is best illustrated in Maine's detailed account of the structural effects of British legal procedure on custom. For this paradoxical process, in which native law became ever more religious at the hand of a secular British administration, over time revealed a crucial fact about native society, namely that '[w]hat an Oriental is really attached to is his local custom.' According to Maine, what had come to light, most importantly with the settlement of the Northwest Frontier, is that large bodies of customary usages developed

38 Maine, Village-Communities, n. 10 above, 31-62.
40 Maine, Ancient Laws, n. 3 above, 33-9; Maine, Village-Communities, n. 10 above, 41.
41 Maine, Village-Communities, n. 10 above, 39.
independently of written law. And from 1857 onwards, these ‘unwritten usages, probably older and purer than Brahminical written law are now having their authority acknowledged even by the Indian Courts, once the jealous conservators of the integrity of the sacerdotal system’. And while many of these rules once written have been penetrated by or coloured by Brahminical norms, especially under British dominion, the Institutes of Manu, which were once taken as the codified law of India, have been shown ‘to embrace a far smaller portion of the whole law of India than was once supposed, and penetrates far less deeply among the people’. If the codified law of India could not withstand the penetration of English modes of legal thought and practice, unwritten customary laws and usages were even more susceptible to the ‘contagion, so to speak, of the English system of law’. More than the prejudices or conservatism of English lawyers, in the lower jurisdictions, it was the ‘mere establishment of local courts’ which upon contact with native usage functioned to undermine the social and political bases of the system of archaic jurisprudence. In a striking dramatization of the effects of colonial legal intrusion at the village level, Maine narrates the effect of British dominion as not only rigidifying native custom but also instantiating a legal revolution; customary practices are generally collected from the testimony of village elders; but when these elders are once called upon to give evidence, they necessarily lose their old position. They are no longer a half-judicial, half-legislative council. That which they have affirmed to be the custom is henceforth sought from the decisions of the Courts of Justice, or from official documents which those courts receive as evidence... Usage, once recorded upon evidence given, immediately becomes written and fixed law. Nor is it any longer obeyed as usage. It is henceforth obeyed as the law administered by a British Court, and has thus really the command of the sovereign. The next thing is that the vague sanctions of customary law disappear. The local courts have of course power to order and guide the execution of their decrees, and thus we have at once the sanction or penalty following disobedience of the command. And, with the command and with the sanction, come the conceptions of legal right and duty.

The effect of British dominion, then, was to re-ground law in India upon Austian principles of command, sovereignty, sanction, and right, but in a manner that transmutes custom beyond recognition.

The presence of the English legal system initiates a cascading process whereby continuous legal interventions are made necessary by this initial transformation of custom into written law. For Maine, the essence of unwritten customary law, and indeed the feature which accounts for its lon-

42 Maine, Village-Communities, n. 10 above, 53.
43 Maine, Village-Communities, n. 10 above, 39.
44 Maine, Village-Communities, n. 10 above, 75.
45 Maine, Village-Communities, n. 10 above, 71-2.
46 Maine, Village-Communities, n. 10 above, 75.
48 Maine, Village-Communities, n. 10 above, 149.

gevity, is its inherent flexibility. The tribal assembly or village council, or whatever body is charged with its supervision, functions both as a legislative and judicial body, with the ability to re-shape usage in the face of changing circumstances, through the tacit invention of new rules. Once customary practice is set into writing, however, the invention of new rules is impossible, for customary law can offer no other explicit principle upon which to base legal reform, except in reference to the authority of tradition or ancient usage. Without explicit principles, the new British Courts and indeed the new class of native lawyers, when confronted with ever-increasing numbers of disputes that do not fit easily under a particular set of codified custom, inevitably augment these codes with ‘wholesale and indiscriminate borrowing from English law’. The unfortunate result is a motley amalgamation of un-reconstructed native custom alongside a haphazard set of substantive English law.

The Break up of the Village Community

As with the case of native law, early Company officials attempted to retain continuities in rule in the area of land revenue. For Maine, like the case of native law, the process of establishing and administering a uniform land revenue system brought about profound transformations of native institutions. In practically determining the administrative unit of agrarian society, the settlement agency determined the ‘entire political and social constitution of the province’. The settlement of revenue prioritized the task of registering, discovering, and fixing all known rights to land, thus inaugurating a host of debates about the nature and existence of property rights or concepts of legal ownership in India that were comparable to English real property law. For Maine, this initial process often involved a combination of mistaken and controversial policies, usually stemming from bad analogies of Eastern and Western phenomena. Whatever settlement was reached, the procedure itself initiated processes of structural change in the arena of legal rights.

In Maine’s account, when a new territory was incorporated in the British Indian Empire, one of the primary tasks was to effect a ‘settlement’ or adjustment of land-revenue. Whether this payment was considered a land-tax or rent was a key issue, for each was embedded in rival views of colonial sovereignty. The British Government assumed the role of the previous Mughal Emperor, and in doing so, claimed a large share of the produce of the soil. According to Maine, most commentators believed the Mughal Emperor, according to the theory of Oriental Despotism, owned all the land, an error from which many misconceptions followed. One
consequence was the belief that if the British now assumed the Mughal right to collect land-revenue, they assumed this proprietorship and had the further right to redistribute it as they pleased (i.e. could choose to invest certain classes with private property rights). This logic led to many famous debates about what class of persons the government should settle with and whether these persons ought to be invested with proprietary rights (along the model of English real property). The two great rival schools of administration were those who sided with Cornwallis and the Permanent Settlement of Bengal and those who supported Munro and the ryotwari experiment in the Madras Presidency. The first conferred rights to zamindari middlemen in an attempt to create large estates (on a British model) and the second was based on direct settlement with the cultivator in the hope of creating a class of peasant-proprietors.49

According to Maine, the second controversy which stemmed from trying to understand the nature of land-revenue was whether payments to the government ought to be considered land-taxes or rent. If indeed the sovereign was also the supreme landowner, then land-revenue was a kind of rent or lease paid for the right to occupy and cultivate the land. But if rents were set by custom and bore no relation to either the productive capacity of the soil or market value of land, can this payment still be called 'rent'? For the right to take the highest competitive rent is a right derived from the rule of the market (and thus a right of contract). And what consequences would the recognition of customary rent have for the theory of sovereign proprietorship? According to Maine, British officers, trained in political economy, failed to distinguish between customary forms of rent (linked to shared rights in property) from competitive rents which assume a free market in land, and thus set the terms for a century of confusions about the nature of economic life in India.50

For Maine, these central controversies continually plagued the Anglo-Indian government, only receiving some clarity with the settlement of Punjab and Northwest Provinces (1850s), where the village community was finally discovered and legally recognized as the proprie ty unit of agrarian society. Study of village communities revealed that there was ownership in land but it was often shared, invested in the community as a whole. Likewise, 'rent' existed but not in the true economic sense, for tenancy was often hereditary and payments were set by custom.51


50 Henry Sumner Maine, Talookdaree Bill, Waste Lands, and Redemption of Land Revenue in Oudh, Minute dated 10 July 1864, MSS.Eng.C.179, India Office Library. See Stokes, The English Utilitarianism and India, n. 49 above, for a detailed account of the controversies around the idea of rent.

51 Maine, ‘The Effects of Observation…’, in Village-Communities, n. 10 above, 222.

But before these ‘discoveries’ were made, mistaken notions of ownership and misplaced conferral of rights had serious consequences. For,

The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights, and to the attempts of English functionaries to separate the two may be assigned some of the most formidable miscarriages of Anglo-Indian administration.52

Moreover, the process of ascertaining the nature of land-tenure itself initiated structural changes that would eventually lead to the dissolution of the village community as it had existed. The initial task of the Settlement officers was to identify classes of person who would be deemed responsible for collection and payment of revenue. According to Maine, a critical product of these investigations into the rights in soil that existed on the eve of conquest was the Settlement Report and a detailed registry of these rights known as a ‘Record of Rights’. This detailing necessarily produced numerous controversies between different groups and between the State and poyner. In attempting to resolve these disputes the duties of the Settlement Officer (and later the Revenue Boards) inevitably took on a quasi-judicial character as they decided upon complaints to this record.53

Since the most prevalent modes of settlement conferred property rights on particular individuals (even when deeming certain classes of persons appropriate to this task), settlement introduced notions of alienable property with all its related bundle of powers. As we saw in Maine’s historical scheme, alienable property, private property in its mature sense, is intimately related to notions of individual right and freedom of contract. In ancient societies, the law of persons is confounded with the law of property, ownership is always embedded within ties of family and kinship. Thus, for Maine, the introduction of notions of personal right into this form of community necessarily undermined its systematized ties of reciprocal obligation. The sense of personal right (instantiated and protected by the English courts) had increased with British rule, as could be seen in the growing number of cases of division of joint properties and testamentary successions that disinflicted the traditional claims of the extended family. With the further encroachment of contract law into personal relations of mutual dependence, the growing sense of personal right in the village community was ‘destructive of the authority of its internal rules’. And it was the ‘growth on all sides of the sense of individual right’ which represented ‘the greatest change which has come over the people of India and the change which has added most seriously to the difficulty of governing them’.54

52 Maine, Ancient Law, n. 3 above, 252.
53 Maine, Village-Communities, n. 10 above, 33.
54 Maine, Village-Communities, n. 10 above, 74.
In Maine's sociology of colonialism, as it were, the bases of native society are seen as increasingly undermined by contact with the modern. The transformation of law and custom and the dissolution of the village community are vivid examples of the ways in which the colonizing process sets ancient and modern societies into a dramatic and living opposition. The immanent conflict between these two forms of sociality reveals the fundamental ambiguity at the heart of Maine's conceptualization of native society. On the one hand, native society is rendered a conceptual whole, a functional totality with its own logic of reproduction and stability, demonstrated clearly in its differences from modern society. On the other hand, despite the internal coherence of native institutions, this structural integrity was construed as fragile and increasingly threatened under modern conditions. Indirect rule was, in part, premised upon this holistic vision of native society as both functionally intact and vulnerable to imminent dissolution.

**Practical Paradoxes: Maine's Tenure as Law Member**

Maine's tenure as law member of the Governor-General's council coincided with an important transitional phase in the history of British rule in India. Coming on the heels of the Mutiny of 1857 and the assumption of direct rule by the Crown, the central task of government was orientated toward the stabilization of rule without fomenting further native agitation. With this task in mind, Maine's tenure is usually construed as eminently practical in orientation, preferring to chart a middle road between reform and retribution. Ironically, it was also a period of great legislative activity; indeed Maine himself presided over the drafting and passing of over 200 Acts between 1862 and 1869.55 But to render Maine's attitude as merely practical is to underemphasize the degree to which Maine's definition of what was practical was itself premised upon Maine's view of the nature of Indian society, on the one hand, and the impact of British rule, on the other—both of which were profoundly conditioned by the experience of the 1857 Rebellion.

During Maine's tenure in India, his theoretical and historical work on the nature of primitive society most prominently came to bear on two sets of policy concerns, on the question of codification of the civil law, and the problem of stabilizing property right in land. As was noted above, for Maine, the fact that India's traditional institutions and laws were vanishing under the impact of British dominion was lamentable. For the colonizing process not only rendered the scientific study of living forms of ancient society precarious; it also paradoxically made India practically 'ungovern-

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56 Maine, *Village-Communities*, n. 10 above, 75.

57 Maine, ‘Memorandum’, n. 47 above.
to abandon the historical mode of dealing with a practical question peculiar to the Indian government, to choose the social and economical principles on which it was intended to act, and to adhere to them until their political unsoundness was established.41

4. The Theoretical Origins of Indirect Rule

THE LESSONS OF 1857

Although Maine himself sought to enact a framework of reform that shied away from the impulse to recreate government on a ‘native basis’, many energetic followers sought his authority for just such an enterprise. At the most general level, Maine’s work appealed to advocates of native institutions for three main reasons: the critique of utilitarianism, the sympathetic portrayal of native society, and a new sociological account of the impact of colonialism on native society. Maine’s critique of utilitarianism was particularly salient in debates about British policy in India as utilitarianism had achieved a degree of prominence in questions of colonial political and economic reform in the period before 1857. Maine’s assault on utilitarianism’s rationalist methodology not only undermined the applicability of its doctrines but it also suggested that the gravest errors and injustices of British rule, in fact, stemmed from its misapprehension of the true basis of Indian society. In this sense, Maine’s critique echoed older Orientalist, paternalist, and romantic policy traditions that had expressed discontent in the face of evangelical, liberal, and utilitarian attempts at wholesale societal transformation.42

This critique also became all the more pertinent after 1857 as the crisis following the Mutiny forced a radical rethinking of imperial policy, the colonial project, and the nature of the ‘civilizing mission’. In his own reflections on the causes of the Mutiny, Maine had argued that a general lack of accurate knowledge of native religious beliefs and customs had precipitated revolt. According to Maine, the Mutiny was a shock to the English mind, not only because of the unprecedented speed and scale of the Mutiny’s expansion into insurrection but also because it seemingly sprang from inscrutable sentiments, namely religious and ‘caste’ sentiment. Crucially, Maine declared this blindness to the strength and persistence of religious sentiments as arising from ‘defect of knowledge or imagination which hides these truths from the English mind’.43 This lacuna in the English mind, however deep, could be overcome through the acquisition of better and more appropriate knowledge of native practices and beliefs. He

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38 Maine, Village-Communities, n. 10 above, 26–8.
41 Maine, Village-Communities, n. 10 above, 178.
42 See Stokes, The English Utilitarians and India, n. 9 above.
wrote, ‘I am not making any confident assertion on a subject so vast and so superficially examined as the character of native Indian religious and social belief. But I insist on the necessity of having some accurate ideas about it, and on the fact that a mistake about it caused the Sepoy Mutiny’. Thus fundamental questions about the character and strength of native beliefs were necessarily linked to the exigencies of colonial governance.

In framing the cause of the revolt as epistemic, Maine very much tied future remedies to expanding the different apparatuses for knowledge gathering and dissemination. And in this appeal for greater and more accurate knowledge, Maine was also critically redefining the parameters of appropriate knowledge of India. For what the Mutiny proved was that the past epistemological and methodological assumptions of colonial knowledge were mistaken and/or tangential to the real effective concerns of governance. For Maine, previous accounts of Indian social, political, and religious life suffered two main drawbacks. Since most colonial officers and European observers were based in the Presidency towns along the coasts, which had long histories of contact with the outside world, they mistakenly took the urbanized (and more secularized) natives they encountered as representative of all of India. This made them overestimate the possibility of reforming native belief along Western lines and thus underestimate the rigidity of native habits. Second, Orientalist scholars and their Brahminical native informants tended to project falsely Brahminical norms and practices as empirically dominant. For Maine, the Mutiny demonstrated the extent to which custom and traditions were the true guide to native practices and institutions, the logic of which could not be derived from the study of Sanskrit texts alone. Rather, for Maine, the colonial administrative archive was to be the locus of evidential truth about India’s living customs. In this sense, colonial settlement reports, district gazetteers, and annual adjustment reports were by far the most precious sources of colonial knowledge.

Maine’s reconstitution of the appropriate bases of colonial knowledge served as an enormous fillip to the growth of ‘official anthropology’ and its influence in crafting colonial policy. Indeed Clive Dewey, in an article

64 Maine, ‘India’, n. 63 above, 478.
65 See Nicholas B. Dirks, Castes of Mind: Colonialism and the Making of Modern India (Princeton, 2001), 148: ‘There was an explosion of ethnographic research, collection, and writing in the last decades of the nineteenth century, as the state sought to accumulate the knowledge necessary both to explain the occurrence of the rebellion and to assure that it would never happen again. Victoria’s proclamation of noninterference further necessitated a detailed catalogue of what had to be preserved and protected, even as various agencies of the colonial state—from the magistracy and the courts to the police and the army—came to assume the foundational character of ethnographic knowledge.’
66 Maine, Village-Communities, n. 10 above, 39; Maine, ‘The Effects of Observation…’, n. 37 above; Maine, ‘India’, n. 63 above.

assessing Maine’s influence on agrarian policy in India in the aftermath of 1857, credits Maine’s methodological innovations with triggering a great reversal in strategies of agrarian reform. According to Dewey, between 1857 and 1906, the Government of India altered its entire agrarian strategy, repeatedly legislating against the institution of laissez-faire market relations. This period was marked by an interest in the rehabilitation of native customs and institutions to avert the political and economic instability that supposedly sprang from their erosion; protection of the village community was thus central to new agrarian strategies. Trained in the conceptual language and methods of Maine, a new generation of officials, rather than disclaim the influence of caste and custom like their utilitarian predecessors, tended to see in traditional institutions such as the village community, forces of social stability.

For Dewey, Maine’s work was central to this counter-revolution. As his texts became required reading for Indian Civil Service exams, Maine’s influence trickled to all levels of service, providing the general intellectual climate for the shift in agrarian policy away from economic modernization and utilitarian reform. Maine’s work had an enormous impact in the intellectual development of many of the leading civil servants of the period, such as Sir Denzil Ibbetson, Sir Alfred Lyall, S. S. Thorburn, Sir Lewis Tupper, Sir Raymond West, and Sir James Wilson; anthropologist-cum-civil servants like Ibbetson, Tupper, and Wilson would become the central architects of this revisionist strategy. The hallmark achievement of this agrarian strategy was the passage of the Punjab Alienation of Land Act (1900) which prohibited land sales between members of different tribes (thus violating the most basic principle of laissez-faire and confirming caste formations).

According to Dewey, there were two key aspects of Maine’s methodology, namely his evolutionary schema and proto-functionalism, which lent themselves to a sympathetic assessment of native institutions. For Dewey, evolutionism had inculcated an ‘elementary relativism’ in the analysis of institutions. By highlighting the radical differences between primitive institutions and their Victorian counterparts, evolutionism questioned the propriety of instituting modern institutions in the Indian context.

68 Some of the key acts which were violations of basic market principles: The Deccan Agriculturists’ Relief Act (1879), Bengal Tenancy Act (1888), Punjab Alienation of Land Act (1900), Bengal Sealed Estates Act (1904), Indian Cooperative Societies Act (1904), Punjab Panchayats Act (1912). See Dewey, n. 67 above, 368-70.
69 According to Tupper, the central administrative lesson of Maine’s work was that the ‘conception of stages of growth in society leads directly to the conviction that the institutions of any community should correspond to its existing stage of growth’. See Sir Charles Lewis Tupper, ‘India and Sir Henry Maine’, (1898) 46 Journal of the Society of Arts, 399.
Likewise, Maine’s proto-functionalism had demonstrated the internal rationality of primitive society; rather than simply anarchisms, caste formations and village communities came to be viewed as rational adaptations to different environments. Here is a direct example of how, despite Maine’s reservations about the direct translation of his scholarly account of native society into policy recommendations, his portrayal of the self-sufficiency and internal rationale of primitive society could be harnessed to arguments in favour of reconstituting society on a so-called ‘native’ model.

But what, I would argue, was the linchpin for the consolidation of this new strategy of rule, was the underlying account of the sources of order in colonial society, specifically a theoretical outlook which saw the protection of native society as a prerequisite to colonial order. For advocates of native institutions, Maine’s cogent account of the disruptive impact of colonial institutions upon native society vividly demonstrated the urgent need for protection. In this sense, the sympathetic portrayal of native society was coupled with a sociology of colonialism that imputed colonial reform and intervention as causes of instability. The call for the protection or rehabilitation of native society, which was the ideological basis of indirect rule, was committed not only to the idea that native society contained within itself the resources for its maintenance and reproduction, but that this unity was threatened most directly by the current strategies of colonial rule. For it was the portrayal of native society as simultaneously intact and vulnerable that recommended the policy reversals and thus underpinned the paternalistic impulse of indirect rule.

**From India to Africa: The Consolidation of Indirect Rule**

In *The Dual Mandate in British Tropical Africa* (1922), Lord Lugard famously elaborated the basic administrative schema of indirect rule in terms of a system of native authorities run by traditional rulers working in tandem with native courts which administered customary law. For Lugard, liberty and self-development can be best secured to the native population by leaving them free to manage their own affairs through their own rulers, proportionately to their degree of advancement, under the guidance of the British staff, and subject to the laws and policy of the administration.70

The incipient evolutionism in Lugard’s formulation of indirect rule functioned in tandem with a view of native administration as the most secure method of maintaining law and order. In 1930, Donald Cameron, a protégé of Lugard’s, restated the main purposes of native administration as the vehicle that will shape

70 F. D. Lugard, *The Dual Mandate in British Tropical Africa* (London, 1922), 94.
And while in India, this was a curative formula that was limited in scope, in Africa indirect rule took on a preventative and preemptive character.\(^{74}\) In connecting and combining these different policies under the general rubric of a policy of indirect rule, I want to emphasize the theoretical continuities between a form of rule that was most prominently enacted in directly governed colonies in Africa, but whose guiding spirit first came to light in the experience of empire and rebellion in British India.

Maine's scholarly account of the dual nature of native society was a pioneering formulation that contained the different components of what would become the ideological bedrock of indirect rule. The ideological basis of indirect rule, the notion that the reconstruction of 'native' law under 'native' authority could act as a bulwark against an instability supposedly produced by the imposition of alien institutions, was itself premised on an intellectual reorientation regarding the nature of native society, the institutions that accounted for its stability and reproduction, and the impact of colonial rule on these institutions. In Maine's account, native society was rendered a conceptual whole, a functional totality with its own internal rationale and logic of reproduction and stability. On the other hand, despite the internal coherence of native institutions, this structural integrity was construed as fragile and increasingly threatened under modern conditions. Indirect rule was, in part, premised upon this holistic vision of native society as both functionally intact and vulnerable to imminent dissolution. Maine was the earliest theorist to have formulated this influential and contradictory account of native society.

The claim that in Maine's work we can locate the theoretical origins of indirect rule also emphasizes the ideological character of indirect rule.\(^{75}\) While indirect rule is often characterized, and indeed was justified, as born of practical necessity, the characterization of what was a pragmatic response to the problem of order dramatically changed over time. More specifically the idea that the reconciliation with authentically 'native' institutions, rather than their eradication, would lead to stability was a dramatic reversal of earlier ideologies of colonial rule.

In this sense, indirect rule represented a determinate move away from earlier projects of assimilation and modernization, of a direct rule which was closely allied to ideals of the civilizing mission (however contradictory and limited in scope this ideal proved to be). This reversal of the goal of major transformation in native institutions, in practice entailed a move to bolster, invent, and reinforce native authorities seen as 'traditional'. The move was double-edged; on the one hand, it eulogized the stabilizing and inherently beneficial character of native rule, under native law, for native subjects. At the same time, in acceping the authority and appropriateness of native customary law, colonial policy inscribed the native as naturally at home in his/her custom and thus resistant to reform, conversion, assimilation—in short, civilization.

This new conceptualization of native society and custom also implied a tight integration of the subject of customary law to the corporate entity (whether defined in religious or ethnic/tribal terms) endowed with the legal authority over customary law. Group or corporate identities became increasingly central to the dynamics of colonial power.\(^{76}\) This vision, in sharpening boundaries between communities, entailed an equally persistent denigration of the status of the Europeanized native. As 'respect' for native institutions in their difference increased, the boundaries between colonized and colonizer, between black and white, between 'traditional' and 'modern' natives were redefined and sharpened. Whereas Thomas Macaulay, in his famous minute of 1835, called for the creation of a class of middlemen, 'a class of interpreters between us and the millions whom we govern a class of persons Indian in blood and colour, but English in tastes, in opinions, in morals and in intellect',\(^{77}\) to serve as mediators of empire, by the turn of the century, Lord Lugard renounced the utility of these mimic men as viable cultural translators between colonizer and colonized. Simultaneously alienated from his traditional life and rebuffed from white colonial civil society, the Europeanized native was seen as caught in limbo, psychologically strained and dangerously unsatisfied; the Europeanized natives, in Lugard's vision, were an unstable and untrustworthy class upon whom neither future self-government nor collaborative arrangements could depend. Instead, Lugard and his successors sought 'traditional' leaders (i.e. chiefs, princes, sultans) to incorporate into the sinews of colonial power.\(^{78}\)

The institutional structure of indirect rule was premised on both this intellectual reorientation regarding the nature of 'native society' as well as the enhanced capacities of the modern state. As such, indirect rule developed into a specific technology of colonial rule, far more complex and systematic than either an elaboration of a principle of non-interference in

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\(^{74}\) The argument of this paper is heavily indebted to Mahmood Mamdani's *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, 1996), especially his original and striking formulations of the theory and practice of indirect rule in Africa. Moreover, Mamdani's book is the only work that, to my knowledge, attempts to draw a specific link between Maine and the theory of indirect rule. What I hope to specify, however, is the precise nature of that link, for Maine never explicitly argued for the ruling of subject peoples through native institutions (as Mamdani assumes).

\(^{75}\) There is another way in which indirect rule can be construed as ideological. The enactment of indirect rule masked quite radical transformations in the character of colonized societies under the guise of continuity with native traditions. See Mamdani, *Citizen and Subject*, n. 74 above.

\(^{76}\) See Dirk's account of the 'ethnographic state' in *Castes of Mind*, n. 65 above.


'native' affairs or a strategy of collaboration. At its height, indirect rule entailed the strategic deployment of legal pluralism, i.e. the active construction of separate realms of customary, religious, and civil or state law which were hierarchically ordered and subsumed under the central authority of the colonial state. Unlike early-modern models of plural jurisdictions, where religious, civil, and customary laws worked within overlapping jurisdictions, the new model of legal pluralism of the colonial era was premised upon the explicit dominance of state law in relation to 'traditional' forums, which were imputed special status by the state itself. Rather than the eradication of jurisdiction lines and universalization across legal systems, other systems (whether of a customary or religious nature) were hierarchically incorporated under the sole authority of the state. Plural jurisdictions were maintained and even reinvigorated while these authorities were hollowed out and redirected to the state legal regime; '[i]ndigenous law was recognised precisely when it could no longer offer a true alternative to the power of the colonial state'.

**Legacies of Indirect Rule**

Despite the enormous political and social transformations involved in decolonization, the legacy of indirect rule is difficult to overestimate. Ideologically, the holistic account of native society remains resonant, especially in contemporary discussions about culture, community, and communalism in the non-European world. Moreover the institutional framework of a hierarchical legal pluralism built on corporate identities has deeply marked the political and legal dilemmas of many postcolonial societies. Indeed, the most critical and controversial issues of postcolonial politics bear the institutional imprint of indirect rule: rival customary traditions and the 'ethnic' question; secularism, religious and civil law, and questions of interpretive authority and authenticity; gender and the delineation of the 'public' and 'private'. Viewed in this way, the central political struggles of colonial and postcolonial history can be usefully characterized as varied contestations over the state's moral and political authority to define, interpret, and legitimize 'customary' laws (a category itself forged and politicized within the context of colonialism). Interpellating the modern postcolonial citizen-

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80 Some relevant works on the legacy of indirect rule, the making of customary law, and colonial legal transformation include: Mahmood Mamdani, Citizen and Subject, n. 74 above; Martin Chanoon, Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia (New York, 1985); Sally Falk Moore, Social Facts and Fabrications: Customary Law in Kilimanjaro, 1880-1930 (Cambridge, 1986); Kristin Mann and Richard Roberts (ed.), Law in Colonial Africa (Portsmouth, NH, 1991); Margaret Hay and Marcia Wright (ed.), African Women & the Law: Historical Perspectives (Boston, 1982); W. J. Mommesen and J. A. De Moor, European Expansion and Law: The Encounter of European and Indigenous

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subject, from within these multilayered legal systems, is always-already fractured by the passage via the 'customary'. Jurisdictional politics, contestations over the nature and relative scope of 'customary' and civil law are thus also contestations over state legitimacy. This perhaps is a defining characteristic of postcolonial sovereignty where legitimacy is necessarily tied to the moral and political authority to define and interpret 'customary' traditions.

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5. Conclusion

Through the course of the essay, I have tried to demonstrate the connection between Maine's work and the changing ideologies and practices of imperial rule through an analysis of, on the one hand, the central concepts and methodologies of his social and political thought and, on the other, his scholarly and policy-oriented writings on India. I have argued that Maine's theoretical project, especially in the analysis of the historical movement from status to contract, the influential critique of social contract theory and utilitarianism, and the formulation of a comparative methodology, worked to emphasize a radically dichotomous classification of modern and traditional societies. This contrast between ancient/primitive and modern, although grounded in an evolutionary scale that saw modern society as the pinnacle of progress, nevertheless imputed traditional society with a coherence and historicity of its own. This double-edged vision thus lent Maine's conception of traditional society a central ambiguity which would become utilized in important ways in the context of late imperial ideologies of rule.

In contrast to earlier liberal ideologies of rule, ones in which the moral justification of rule was premised on the transformative and civilizing potential of colonial domination, late imperial strategies were founded in a deep scepticism about the possibility that native society could be radically transformed. Thus the dichotomy of the modern and the traditional, the central theoretical innovation of Maine's social theory, served to buttress these new ideologies of rule. In attributing to traditional societies a new kind of stability and insufficiency to reform, Maine's conceptualizations became available to colonial powers which sought to develop methods of rule that would harness these native energies to ensure order and stability. In new dynamics of rule, the infiltration of modern (colonial) models of law, economy, and politics would all be limited because they were now construed to inherently bear disintegrative effects on traditional society.
Thus the radical difference between modern and traditional societies was buttressed by a sociology of colonialism that now depicted the imposition of the modern as the very source of instability in the colony. In this sense, Maine’s models of traditional society and his sociology of colonialism implicitly elaborated not only a justification for the abjuration of the transformative ambition of liberal ideologies of rule but also a theoretical rubric for how a ‘non-interventionary’ colonial regime rule could be structured. It is in this sense, then, that Maine emerges as an important figure in the intellectual history of empire and, specifically, the transcontinental shift to forms of indirect rule characteristic of late imperial policy.

MAX WEBER AND COMPARATIVE LEGAL HISTORY

David d’Auray

1. Introduction

After summarizing Weber’s method for doing comparative legal history I will look more closely at what he says about the common law and capitalism. As is well known Weber thinks that the growth of rational law furthered the development of capitalism. However, he also argues the common law of England was in many ways irrational, not least in the formative period of ‘calculating capitalism’, the type of capitalism that he believes first emerged in the modern West (as opposed to high risk gambler capitalism and state contract/tax farming capitalism, economic forms which he thinks are common in world history). So he has something to explain, and his solution is typical of his method and approach.

The main contribution of this paper is to give a short clear account based on a direct close reading of Weber. Understanding of his thought has been clouded by secondary literature which can actively distort it. Many people associate Weber with the problem of ‘modernity’. Modernity is an important concept, in the same kind of sense that, say, ‘the Mandate of Heaven’ is an important concept for Chinese history, or ‘Karma’ for the history of some eastern religions. These are concepts which one must study because they were influential. The historian does not have to think they have an objective basis. If the historian believes in them, that is a matter for personal rather than professional life. They are different from concepts custom-built by historians and sociologists in a professional capacity to process empirical data. I do not know that Weber used any concept quite like ‘modernity’ as it is used by a lot of scholars nowadays. The distinctive development of the West was a central problem in his work—rational capitalism, bureaucracy, etc.—but that is not quite the same thing as...

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1 After I had given the conference version of this paper, David Sagarman kindly sent me his ‘In the Spirit of Weber: Law, Modernity and “The Peculiarities of the English”’, Institute for Legal Studies [University of Wisconsin-Madison Law School] Working Papers Series, 2 (Madison, Wisc., 1987). Although we see Weber through different eyes, this paper is valuable for the perceptive empirical analysis of English legal system and its history into which his discussion of Weber leads him. The bibliography on Weber is a marvel magnum. For some studies relating to law see the bibliography in Cary Boucoc, In the Grip of Freedom, Law and Modernity in Max Weber (Toronto, 2000) and the footnotes to Harold J. Berman and Charles J. Reid, Jr., ‘Weber as a legal historian’, in Stephen Turner (ed.), The Cambridge Companion to Weber (Cambridge, 2000), chap. 11.