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A B S T R A C T

THE POLITICAL IDEAS OF SIR HENRY MAINE

CHAPTER ONE is concerned to describe the prevailing conditions in 19th century England as a context within which Maine's work may be seen. In general terms this provides an understanding of the economic, social and political circumstances, and more especially an understanding of the intellectual background. Here an outline is presented of the major developments in both jurisprudence and political thought.

CHAPTER TWO deals with the object and structure of Maine's thesis. His position in regard to the major theories of jurisprudence is defined and the significance of his attack on the concept of Natural Law is explored. Maine's Historical Method and the political implications of his position are then examined.

In CHAPTER THREE the directions of Maine's historical investigations are charted and the logical status of his most outstanding thesis, the Patriarchal Theory, is clarified. The dynamic aspect of the theory is disclosed by tracing Maine's description of the origin, early character and evolution of society.

ABSTRACT/Sir Henry Maine

CHAPTER FOUR deals with the general characteristics of conservative political thought as a prelude to the discussion of those features peculiar to orthodox conservatism. After indicating the immediate historical background of Popular Government, the major themes of Maine's political treatise are then discussed under the headings Totalitarianism and Constitutionalism. The affinity of Maine's ideas with the tradition of Analytical Conservatism is then noted. The discussion of conservative principles reveals further evidence of Maine's sympathy with this tradition.

CHAPTER FIVE concerns the relationship between the political and historical aspects of Maine's work. The foundations underlying this connection are then exposed. Note is also taken of contemporary assessments of Maine's contribution and the major criticism to which it has been subjected.

CHAPTER SIX concludes with a description of the character of Maine's thought and an assessment of its value.

THE POLITICAL IDEAS OF SIR HENRY MAINE

Norman Pilling

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CHAPTER ONE

CHAPTER ONE

I N T R O D U C T I O N

THE IMPORTANCE OF MAINE'S LEGAL STUDIES

Henry Maine was primarily a legal historian. Consequently, any assessment of his contribution to political ideas must take into account the wider aspects of his thought. The advantages to be gained from such an approach are two fold. In the first place, consideration of his legal thought reveals the background against which many of his more specifically political ideas may be highlighted. Dr. Roach said, "Maine saw Popular Government as an extension of his life long study of the history of early institution and the ideas which it contains need to be referred back to the theories developed in his four earlier books."¹

In the second place, the political influence of Maine's ideas has, in part, been felt through his influence upon legal thought. K.B. Smellie has said, "Maine's effect on political thought was chiefly indirect, through his enormous influence upon jurisprudence. His juristic ideas had political implications; his historical search for the conditions that had caused the differences between stationary and progressive societies called obviously for contemporary application."² That Maine should

have influenced political philosophy through his investigations into the realm of law is not surprising, since, as Sir Ernest Barker maintains, jurisprudence is but one of the avenues of approach to the study of political theory. He noted, when relating the two disciplines: "The connexion between jurisprudence and political theory is close and obvious. If one is concerned with justice, and the other with morality - if one deals with the external rules which direct actions in the ordered community and the other with the ideas that lie behind rules and the ideal which lies behind order - both are at any rate concerned with relations one to another of men who are living in communities."³ But perhaps the importance of jurisprudence to Maine's thought can best be established by noting that it was here that he gave the clearest exposition and application of his 'Historical and Comparative Method'. This method was his greatest contribution to 19th century English thought; it created a reorientation of mid-Victorian legal and political philosophy.

THE STRUCTURE OF THE THESIS

The actual form taken by the thesis may now be briefly outlined in order to provide the guide lines with which the themes developed in the following pages may be more readily traced. The opening chapter is concerned with Maine's statement of intent; the particular objectives

which he had in view. In effect, these objectives amounted to a new discussion of legal institutions, involving the techniques of historical analysis. But before such an enterprise could be embarked upon, Maine felt that it would be necessary to clear the ground for the purpose of demonstrating the desirability of such an approach. A rigorous examination of the most widely accepted legal theories of his day thus constituted the basis of the first five chapters of Ancient Law. Here is developed his position in regard to the analytical jurisprudence of the English Utilitarians and the doctrine of Natural Law, particularly in the radical interpretation given by the disciples of Rousseau. Despite certain sympathies with the role which both these systems had played in legal thought, Maine considered that they were inadequate as legal theories. Only by applying the methods of history to the study of law could a valid scheme of jurisprudence be accomplished. To understand contemporary events, it was essential that reference be made to their origins and subsequent development.

Having examined Maine's discussion of methodological difficulties, the thesis continues in the second chapter with the first fruits of the new method of inquiry. Here his major positive contributions are expounded and analysed. Briefly, the object of his argument, in the remainder of Ancient Law, was to describe the most outstanding features of ancient society,

as suggested by the evidence of early law and primitive records, and to compare these findings with the most important characteristics of the progressive societies of the modern world. From the juxtaposition of this material, Maine felt that it was possible to draw certain conclusions regarding the nature of social change. The most well-known generalisation, which he made in this respect, was that Western progressive society had experienced a movement from a civilisation restricted within the confines of patriarchal power - a condition summarised by the name of status - to a condition in which the primary characteristics were those of contract and individuality.

Following this treatment of Maine's application of his historical method is a discussion of his political treatise, Popular Government. This is, in turn, prefaced by an introduction to the immediate political circumstances in which it was written, as these were of no little importance in determining the character of the work. Some regard has also been paid to the particular tradition of thought to which Popular Government may be ascribed.

Anticipating the sociological investigations of mass organisation in the 20th century and, in particular, Ortega y Gasset's Revolt of the Masses, Maine outlined the dangers of totalitarian dictatorship, emphasizing especially the dangers implicit in the appeal of nationalism and the claims of the extreme democrats. Against contemporary doctrines, Maine, in true

Aristotelian fashion, opposed the established institutions of the middleway; in this case, the established institutions of the British Parliamentary system. Only if this balanced form of government continued; could material progress even be contemplated.

The legal and political features of Maine's thought having thus been analysed, an attempt is made to consider the nature of the relationship between them. The Historical Method, originally shaped in the realm of jurisprudence, forms the essential link. This, together with the ideas underlying the whole of Maine's thesis are elucidated, examined and compared with some of the more important alternative ideas current in the 19th century. As a final reflection upon Maine's work, some criticism of the various appreciations of his position has been offered with a view to the further illumination of his political thought.

THE HISTORICAL CIRCUMSTANCES OF MAINE'S WORK.

Such then, is the manner in which the political ideas of Sir Henry Maine have been approached. But an analysis of his publications alone would be incomplete and somewhat artificial. The whole climate of thought has changed since the Victorian era and, consequently, to attempt to assess his contribution to knowledge without considering

its peculiar context would be to ignore much material that could be of great value for understanding his work. It is tantamount, indeed, to the observation of the life of animals in the zoo with the hope of making generalisations about their behaviour in their native habitat. Just as animals can only be understood when approached from an ecological standpoint, so a competent understanding of Henry Maine must be approached by seeing him in the changing conditions of the 19th century. A brief discussion of this background constitutes the immediate objective of the remainder of the present introduction.

According to J. Bowle, "Three great events thus determined the social framework and political problems of the 19th century. First, the development of a world economy, centered on Western Europe and North America. Secondly, the Western liberal revolution which emancipated a professional and managerial class and gave free rein to capital enterprise. Thirdly, the rise of a politically conscious proletariat, urbanized and industrial."⁴ In sympathy with such sentiments, David Thomson in summary of his survey of the conditions in England, held that "The generation of Englishmen between 1815 and 1850 suffered from the combined aftermath of two great social and political revolutions, the American and French; of two great social and economic upheavals, the agrarian and industrial revolutions; of two great foreign wars, the French Revolutionary

and Napoleonic Wars (1793-1815). The American and French Revolutions set in motion a whole tide of new forces and ideas in politics, and these seeped gradually into her national life after 1815. The agrarian and industrial revolutions, already well advanced before 1815, transformed the face and life of the nation and brought immense prosperity and misery combined. The French Revolutionary and Napoleonic Wars cut right across the effects of both these other events, speeding industrialization but retarding social and political reforms, crushing England's chief continental rival while they liberalised her own politics, and establishing Britain as the peer of great imperial dynasties such as the Habsburgs of Austria and the Romanovs of Russia."⁵ The character of the period may be seen, then, as one of violent change. Age old institutions, customs, values, faiths, whole traditions of thought, were all subjected to reappraisal in the light of new conditions. The great social forces did not simply provide a backcloth to the nineteenth century stage, but they were essentially involved with the very directing of the drama.

The most palpable developments apparent in society were the material changes which were taking place. Perhaps it is Whitehead who has hit upon the basic factor creating the impetus of both the industrial and agricultural revolutions. The mainspring, he suggests, was the realization of technology - the application of scientific discovery to a

practical end. Its impact was enhanced by the fact that the process of discovery assumed rapid proportions. There was not the application of just one great invention but of many. Indeed, Whitehead maintained that "The greatest invention of the nineteenth century was the invention of the method of invention."⁶ But it is the social and economic problems fostered by technology, rather than the actual innovations themselves, which is the immediate subject of our discussion. For without claiming that the material world determines the thought of an era, it cannot be doubted that it is a vital factor in occasioning the preoccupation of thinking men.

Economic Circumstances.

Although there were serious economic depressions throughout the 19th century, those, for example, occurring after the Napoleonic Wars and in the late 1870's, the century taken as a whole was a period of great economic expansion. British industries not only enjoyed a monopoly of their home markets, but initially, had few competitors in overseas outlets. By virtue of the rapid growth in foreign investments and the export of both capital and consumer goods, both encouraged by the policy of laissez-faire, Britain was to assume an all important role in international trade. Not only was she seen as the 'workshop of the world', but also as the 'world banker'. As Court said, ". . . the British

became temporarily the point of balance in the world's economic activities."⁷

But success overseas should not blind us to the tremendous economic activity in the home market. Prosperity came from an increasing demand, from that demand being made effective by an increase in the supply of money, from the relaxation of the law regarding the formation of companies (the Limited Liability Act of 1855), and, presumably, from the multiplier effect resulting from various welfare measures in which the government was engaged. But although these were some of the factors acting in a favourable direction upon the economy, one must agree with Court in maintaining that "The level of economic activity in Great Britain during the middle period of the 19th century is certainly unintelligible without reference to the railways."⁸ Thomas Tooke estimated that during 1847 and 1848 probably not less than one million persons were in some way connected with railway construction. And for the years 1846-1850 the number was probably about 600,000*, a number which was roughly equal to the total population engaged in the factories of the United Kingdom at that time.

The favourable economic conditions also helped the agricultural side of the economy. It is true that there had been a depression in the 1830's, but after this, despite the removal of the Corn Laws in 1846, a new era of agricultural prosperity was entered. It was the period which has come to be known by the title of James Caird's book High Farming.

*This is an average number for these years.

Here reference is made to the increasing use of scientific method in agriculture; new methods of drainage and ploughing, new artificial fertilizers, and the use of manufactured food-stuffs. This greater efficiency, combined with the increasing purchasing power of the growing population, meant that until 1873, when farming became subjected to international competition, British farming enjoyed favourable conditions. Indeed, "British farming became, for the kind of products on which it was based, a leader in the world."⁹

Part of the feverish economic activity in agriculture and industry resulted in a fundamental change in the nature of society itself. In the generation after Waterloo the balance of English economic and social life changed from being predominantly agricultural to predominantly industrial. Even so, in 1851, agriculture remained the largest single employer of the nation's labour force, utilising 1,904,687 men - one quarter of the grown men, according to the census of that date. The next twenty years, however, saw a phenomenal rise in industrial employment, particularly in the heavy industries, machine construction, textiles and railway operations. "Modern Britain, industrialized, mechanized, and urbanized, was coming into being."¹⁰

Social Circumstances.

Two important features of this change from an agrarian to an industrial economy are: firstly, the rapid increase in the size

of population; secondly, the changes in the distribution of that population which largely resulted from the movement from the countryside to the new industrial towns. The magnitude of the population increase can be seen in the census figures for the period. The population of England and Wales had included perhaps 7 1/2 million people in 1780. By the census of 1821 it was up to 12 3/4 million. Between that year and 1871 it was to rise to 22 3/4 million. Thomson claims that the increase between 1851-1871 alone was not less than 5 million.

The reference to this population growth is not without significance: it is an indication of the rise of the industrial state. In combating the persistent anti-capitalist myth of the creation of a proletariat by the capitalist for his own evil end, F.A. Hayek has shown that it was only by virtue of the benefits of the Industrial Revolution that an increase in the size of population was capable of being supported. Previously, men had only been able to survive and to raise a family if they had owned the tools of their particular profession; but, under the capitalist system, where the manufacturer owned the means of production, the benefits accruing from this type of industrial organization enabled the survival of what had, in the past, been a doomed section of the community. Hayek said, "Numbers, which had been practically stationary for many centuries began to increase rapidly. The proletariat

which capitalism can be said to have 'created' was thus not a proportion of the population which would have existed without it and which it had degraded to a lower level; it was an additional population which was enabled to grow up by the new opportunities of employment which capitalism provided."¹¹

But the second feature of the 19th century population - its distribution - is equally, if not more important, than its increasing size. Court suggests that "As the population grew, it became more mobile. This was extremely important for economic development . . . her [Britain's] growth in economic stature owed most to an enormous internal migration. This was in effect the colonisation of an old country. It appeared particularly in the emergence of new regions of economic importance and in the building of town life upon a new scale."¹² The 19th century, then, was a great age of town and city development. The size of the industrial centres of Manchester, Liverpool, Leeds, Birmingham, etc. increased rapidly, both by virtue of the fertility of the town populations themselves and by their absorbing the overflow of the rural regions. Although the countryside was not depopulated - the rural population in 1911 in England and Wales was greater than it had been in 1841 - the distribution of the population within the nation assumed an urban rather than a rural character.

Inevitably, in such a rapidly changing social system, serious problems were encountered. Among these were the problems of public health and sanitation. The customs and practices of the rural areas in this respect may always have been undesirable, but to continue them in an urban community threatened the safety of all. Consequently, despite the dreadful conditions which undoubtedly did exist in urban communities, efforts were being made towards transforming the towns into healthier places in which to reside.

A further problem was presented by the question of poor relief. Various measures had been taken in the 18th century, the Speenhamland and the Gilbert system, for example, but the parochial responsibility these involved proved inadequate. Existing systems of relief were unfair since "It meant that the burden of poor relief was spread very unevenly and unjustly, and led to the habit of taking villagers into the factories in good times but expelling them again to the villages in bad times, so as to save the burden of pauperism from falling on the towns."¹³ These difficulties were partly removed by placing the odium of Poor Law Relief under the centralised Board of Guardians. It was not until 1934, however, when the Unemployment Act of that year established a board under the Central Ministry of Labour, that a satisfactory system of unemployment benefits was devised.

Besides the problems of social benefits and sanitation, the development of industry provoked the need for industrial regulation. Conditions in manufacturing and mining were no worse than they had ever been. In fact, it has been suggested, that conditions in the factories were a considerable improvement over the old cottage workshops. However, the greater numbers now employed in appalling conditions attracted the attention of a number of philanthropists. The most well-known reformer of industrial employment being Shaftesbury. He was concerned with the long hours employees were expected to work, the practice of employing young children, the employment of women in coal mining and many other questionable practices. All of which, though common in the past, now stimulated a violent outcry from certain members of the public.

A brief description has been given of a few of the problems arising from the process of industrialisation and town growth. Not only does it fill out the picture of 19th century life, but it shows why the government found it increasingly necessary to intervene in economic and social activities. It will be useful, at this juncture, to examine the response made by that section of the population most immediately involved: the working class. The reaction of this group in terms of trade unionism and the occasional rioting will serve to complete the picture of the socio-economic scene.

Whilst there is a great deal of truth in N. Sykes' comment that ". . . although the traditional way of expressing grievances was political, the real grievances were economic"¹⁴; unrest was occasionally caused by purely social factors. Such a position is borne out by F.C. Mather, who claims, "There were some areas where conditions of employment and residence so brutalised the population as to produce a tradition of lawlessness which burst forth into open riot even in prosperous times."¹⁵ Normally, though, dissatisfaction with social conditions was expressed at times of economic distress.

Rioting occurred in the immediate post-war period on a number of occasions: the Spa Fields riot of 1816, the protest of 'Peterloo', and the sporadic outbursts in the period preceding the First Reform Act being the most striking examples. Later disturbances included the 'Last Labourers Revolt' and the severe riots in Bristol of 1831. Such general unrest tended to die down somewhat in the Chartist period, and then, when outbreaks did occur, it was of a more restrained character than in either the 18th century or the earlier decades of the 19th century. "The late thirties and forties of the 19th century were marked by no orgies of devastation comparable with the Gordon Riots of 1780 . . . or even with the Bristol Riots, which had occurred as recently as 1831."¹⁶

Like Thomson, Mather held that the introduction of the police force was more effective than the military had been in preventing the

outbreak of disorder. But even when rioting did occur, he noted that in it there was less looting and incendiarism. He continued, "In the main it must be ascribed to the fact that the English industrial working class was on the whole better housed, better fed, better educated, and far less degraded than in preceding years."¹⁷ But, although the rioting was less severe in this period, outbreaks occurred owing to the combination of a series of unfavourable trends: the depression of real wages, cyclical unemployment, bad harvests and the depression of the handicraft industries. The most well-known disturbances of the time were the Plug-Plot and Rebecca Riots of 1842-1843. However, "The threat to English society in the Chartist period did not in fact arise from the strength of the resistance which the rioters were capable of offering to the forces of the Crown, but from the tendency of disturbances to occur almost simultaneously in different places."¹⁸ Spontaneous tumult was the real threat to society rather than organised sedition. Despite their frequent drilling and training and the fact that they possessed some arms, the Chartists themselves never really planned an immediate and general insurrection. They were more concerned with the organisation of 'tumultuous demonstration'. It is significant that the most severe rioting was during the period when the Chartists' hold on the working class was slipping in 1839-1840 and 1848. But the spectre of potential revolution which they created was to haunt the more reactionary figures in British politics for a greater part of the century.

The weakening of the Chartist movement in the period after 1839 was a result of the diversion of middle class support towards the Anti-Corn Law League, the artisans' return to peaceful agitation and the drifting of sections of the working class into trade unionism. Trade unions had been legalised in 1824, but early experiments were largely unsuccessful; the most notable failure, of course, being Owen's Grand National Consolidated Trades Union in 1834. In the 1850's, trade union activity became popular once more in the form of the new model unions. But these were, in effect, merely benevolent societies for skilled craftsmen: the unskilled sectors of the community were not effectively organised until the formation of widely based industrial unions in the closing decades of the century.

The removal of the more articulate members of the working class from direct political action groups, together with increasing social benefits and the favourable economic conditions which prevailed until the 1870's, led to a decrease in social disturbances. Industrial strikes continued, particularly during the Great Depression, but the actual fear of revolution over a sustained period of time was nowhere near as great as it had been even during the era of Chartism.

Political Circumstances.

Having indicated the outstanding characteristics of the social and economic conditions surrounding Maine's life, it will be appropriate

to turn to an examination of the political climate which these new conditions created. The political atmosphere in the immediate aftermath of the Napoleonic Wars, it has been suggested, was charged with the fears of revolution and disorder. The main threat to the establishment came from the disturbances which the post-war depression in the economy engendered; but the fears also stemmed from the political events of the time, events such as the assassination of Prime Minister Spencer Perceval in 1812 and the Cato Street Conspiracy of 1820. Indeed, not only were Roman Catholic Emancipation and the 1832 Reform Act itself passed in an atmosphere of intimidation, but the whole period up to the mid-century was felt by many to be on the verge of open rebellion. Society seemed doomed to fall into the grip of Jacobins. Even if Lord Melbourne's letter to Queen Victoria in 1842, describing the political situation in the country as ". . . certainly very near, if not actually a rebellion . . .",¹⁹ now seems rather alarmist; there is, nevertheless, ample evidence that England faced a serious problem of disorder in the decades between the end of the Napoleonic Wars and the mid-century.

It is hardly surprising that the upper classes tended to exaggerate the dangers. The response of the Duke of Wellington, for example, to the 1832 Reform Act was, ". . . the revolution is made, that is to say power is transferred from one class of society, the gentlemen of England

professing the faith of the Church of England, to another class of society, the shopkeepers being dissenters from the church, many of them being Socinians, others atheists."²⁰ The result of this new hand upon the rein of power, he thought, would be a holocaust of bloodshed and violence, and so it was with some surprise that he was able to say two years later that he hoped that the change might continue to be gradual, "and that it may be effected without civil war and may occasion as little sudden destruction of individual interests and property as possible."²¹ The memory of events in France was still a powerful force in the higher echelons of society, and Wellington was certainly not alone in his fear that the Reform Act had removed the keystone of the British Constitution and opened the way to perpetual change and instability. Mary ". . . did not see the immediate situation in the early thirties as a stage in a quiet shift of political power but rather as the prelude to a repetition in a familiar English setting of the melodramatic horrors of the French Revolution."²²

The Whigs and Radicals, of course, saw no such dangers in these political readjustments. They considered them to be a triumph against sinister interest and the inefficiency of government by an exclusive aristocratic clique. The extension of the franchise to include the middle class not only recognised their growing numbers, but

it enabled their skills as the captains of industry to be employed for the greater benefit of the majority. Thus, in the name of efficiency and the claim to be merely adjusting the governmental machine to the new social conditions, the liberals and their associates continued to work for further reforms. Their success can be gauged from G.P. Gooch's comment that from ". . . the First Reform Bill to the World War the domestic political history of Great Britain was above all the realization of Liberal principles."²³

After the failure of the Chartist movement in 1848, the year in which revolutions swept through the European concert of nations, the instability and fears of social insurrection, which had characterised the English political scene throughout the major part of the century, finally abated. They were replaced by improving standards of living, an atmosphere of feverish industrialism and a popular impression of "progress". For the brief period from the early 1850's to the 1870's, Britain was able to enjoy to the full these years of the 'Great Peace', and to take full advantage of the favourable conditions at home and abroad. In particular these years were important in enabling political and social reforms to respond to the changing structure of society.

The continual interplay between political and social change had a particularly important effect upon the nature and role of the

government. At the beginning of the century the functions of the central administration were extremely circumscribed, in effect being limited to the formation of national policy in the international, commercial and fiscal worlds, and the general maintenance of law and order within the country as a whole. Much of the day to day administration of society remained in the hands of local government and those "maids of all work" the Justices of the Peace. With the growing demands of a rapidly changing world, however, in respect of essential welfare legislation, legal reform and political innovation, a new kind of state was rapidly coming into existence. The days of the 'policeman' state were numbered. Not only did the machinery of the new state differ radically from that of the old, but as it was no longer set apart from the vital activities of the community, because it had, in fact, assumed the role of the 'manager' of society, the whole character of the political process came to be seen in a new light. Politics in England had given way to administration: the administration not only of a highly complex industrial society, but of the greatest empire that the world had ever seen.

In the interest of efficiency and uniformity, the functions of government were increasingly drawn within the province of the central body. Existing departments were extended to assume the functions previously

performed by local organisations, or in some cases, where new problems had come into being, either new government departments or independent authorities were created. It was thus that the Victorian era saw the emergence of a vast and complex bureaucratic machine and the relative decline of the functioning of the individual in public service.

In control of this new machinery of state was a much more integrated Cabinet. After 1867, the end of the 'golden age of Parliament', the Cabinet was able to exercise a dominant control over the whole sphere of political activity. It drew its strength not only from the tightening of the party system, and the growth of personality leadership, but also from the advantages of information and knowledge which it enjoyed as the very focal point of the bureaucracy. No longer was it a loose association of the Queen's ministers, it had become the central nerve point in the organisation of the body politic.

The decline of the limited, aristocratic concept of politics in the 19th century, however, cannot be comprehended without noting the development of the mass political party. The main impetus for party organisation was a result of the registration clause in the First Reform Act of 1832; registration societies formed the very basis of the extra Parliamentary associations. Although some moves were made towards a

greater rationalisation of the party system, it was not until the Second Reform Act of 1867 that the modern party structure really came into being. Block voting, central organisation, annual conferences, party programmes, political crusades and recognised party leaders all rapidly became part of the political scene. Organisation was felt to be the touch-stone of the day, not only in gaining Parliamentary support for the Cabinet, but in gaining support for the government in the country. A similar paradox to that which Michèles observed in the hierarchical organisation of socialist-democratic parties can be seen in the emergence of mass political parties in England. The parties, although claiming the attributes of democratic organisation, rapidly became more formalised, rigid and hierarchical in their structure. The change, then, from a situation in which one can speak of a 'party system' only in a very loose way, to that in which the essentials of the modern structure had been established, occurred in a remarkably short period of time. It was this rapidity which led many observers to feel that the Cabinet and party system was but a temporary halt on the road to direct democracy and the rule of a single demagogue.

Britain was not concerned in any continental disputes during the major part of the period because of her isolationist foreign policy. Nevertheless, some reference must be made to the European scene since it was of no little import in shaping political opinion in this country. The main political forces to be found there were those of liberalism, nationalism, imperialism and a general movement in favour of democracy. Of apparently secondary importance at this time were the communist, socialist and anarchist organisations which preserved the spectre of violent revolution throughout the 19th century. Maine saw, however, that any one of these popular movements in its extreme form could prove to be the spark which, in the tinder-box world of mass society, would burn established forms of government to the ground. His observation of their influence in world politics forms an important insight into his fears regarding the growing strength of mass political movements in England.

In so far as a general pattern can be seen in the political life of European nations, it is clearly that expressed by Thomson, namely that the period between 1815 and 1850 ". . . saw the growth of liberal and democratic movements in Europe partly under stimulus of Britain's example . . ." whilst the period between 1851 and 1874 ". . . saw the defeat of most of these movements and the reversion to more dictatorial and anti-democratic regimes ." ²⁴ This too was the

pattern which Maine discerned, and which he warned against in Popular Government. Examples of the failure of democracy were legion. Mass manipulation, rigged elections, the abuse of the referendum and plebiscite were common features of the time. Perhaps the most notable example being that of the Third French Empire - the dictatorial regime of Louis Napoleon. The democratic revolution, it seemed, was doomed to end in the creation of a military dictator to extricate the nation from the turmoil of anarchy. Everywhere the appeal of this new kind of autocrat seemed endemic among the masses. One cannot doubt that Maine's fears regarding English liberty were not a little affected by emotion displayed on the death of Napoleon III's son - the Imperial Prince.

Even where the experiment in democracy seemed to some degree successful, such as in Switzerland, there were certain characteristics which seemed rather disquieting. The masses revealed themselves as extremely conservative, making any form of progressive legislation very difficult. Consequently, there was an everwidening gap between social conditions and socially desirable legislation. Likewise, in the United States of America, the greatest example of the democratic experiment, difficulties in the nature of government were apparent. Not only was there the increasing uniformity of social life and the seeming importance of appealing to the common denominator in politics which de Tocqueville

had noted, but it was a further instance of a democracy which was unable to maintain internal order. The occurrence of the Civil War resulted in a defeat for the southern states and the destruction of the image of democratic stability.

Instability, however, was not exclusively a feature of democratic society. The revolutions which occurred throughout Europe in 1830 and 1848 (and in France again in 1870) took place in countries which were far from realizing the principles of democracy or liberalism. Neither was conflict and revolutionary zeal enclosed within the confines of particular countries. The struggles to achieve national identity in both Germany and Italy accounted for the main military confrontations after 1815 until the outbreak of the First World War. Throughout the 19th century, then, whether the general pattern of development was towards democracy or authoritarianism, it was a period in which internal and external instability found a prominent role.

THE INTELLECTUAL BACKGROUND TO MAINE'S IDEAS.

The point has now been reached where a discussion of the intellectual background to Maine's work may be of some value. This forms the most important section of any introduction to his investigations, since the climate of thought must, to a great extent, govern the intellectual interests of any period. In this case, two objectives

have been kept in view. The first of these has been to present a sketch of the atmosphere of the intellectual world as a whole. The second has been to bring into sharp relief the general character of the two principle subjects to which Maine made a contribution, namely, legal and political theory. Clearly, only the briefest outline can be attempted, but it will be of some value in assessing Ancient Law and Popular Government to bear this background in mind.

General Background.

Perhaps one of the most outstanding features of the 19th century world is its great variety of creeds and movements proclaiming immutable truths. The faiths which they held were not necessarily new, indeed, many doctrines were of ancient lineage, but all were propagated with something like a religious fervour. Despite their great variety, we may agree with Whitehead, who informs us that in broad outline the faiths of this period were derived from three sources; ". . . one source was the romantic movement, showing itself in religious revival, in art, and in political aspiration; another source was the gathering advance of science which opened up avenues of thought; the third source was the advance in technology which completely changed the conditions of human life."²⁵

If the variety of creeds succeeds in being the most immediate feature to strike one about 19th century thought, then judging by the persistence of the belief, it is closely followed by the impression of confidence which the age is purported to exude. Such an impression regarding the Victorian intellectual world as a whole is, however, quite false. Even where views were asserted in a dogmatic fashion, this was often out of fear rather than confidence.

The main source of material for the view that the Victorian age was one of confidence was drawn from the corpus of ideas known by the label of positivism. This was a style of thought which Noel Annan claimed was the most consistently powerful movement in England for over two centuries. One of its characteristics was its faith in science as the panacea for all ills. It was by science alone that man's destinies could be realized. As Gooch said, "The rapid progress of scientific discovery, above all the proof of the evolution of life forms, profoundly influenced the philosophy of the Victorian age. For a time it seemed as if the riddles of the universe had at last been solved. . ."²⁶ Certainly, the achievements of science cannot be ignored; the great advances in pure science had been quickly utilised in the rapidly expanding field of technology and this had led to great changes in the nature of society.

An offshoot of this faith in science, though of such importance that it warrants a separate discussion, was the positivist belief in the inevitability of progress. This was a doctrine which had been developed in the 18th century, but during the rapid material 'improvements' witnessed by the 19th century, it became even more firmly established. Not only did the changing material conditions of society give apparent support to the popular belief in progress, the theory of evolution was claimed as an ally. Although there is no necessary connection between progress and evolution, the general tendency among Victorian positivists, on the academic and popular levels, was to enlist Darwin's support in their hope for unlimited perfectability.

Believing in absolute truth and immutable laws, the positivists were convinced that these could be secured in all spheres of knowledge by the application of Newtonian methodology. This, they felt, had been successful in many fields, but the results derived from the social sciences had been far from satisfactory. Compared with the physical sciences, its generalisations were too vague and tentative. For many, however, history seemed to overcome these problems, since the data with which it dealt seemed to be of a tangible nature: it dealt in 'facts' of a similar nature to those employed in the older sciences. "History had suddenly become a much more impressive study and had acquired a new status."²⁷ It had

become both the record of man's progress and the means by which future advantage could be reaped. Probably the best example of this particular appreciation of history (if such a discipline can still be called history) is the work done by the arch-positivist Auguste Comte. This use of history in subservience to sociology was an important link in the direction of a universal social theory.

If positivism was the main source of confidence in the last century, then it is to certain sections of the literary world that one must turn to discover its fears and apprehensions. Here the rapid changes in society represented, not the symptoms of a 'brave new world' which was to crown all of man's achievements, but rather a squalid, uniform, senseless, material world devoid of the richness of mediaeval experience. The optimistic assertions regarding the future of man were eschewed as being at the very least debatable. What was more to the point was that the traditional framework of thought was unquestionably breaking down. Thomas Arnold in 1838, for instance, reflecting on the character of contemporary thought, claimed that moral and intellectual questions which had been settled for centuries passed were suddenly being brought once more into open discussion. Such a feeling of dissatisfaction was widespread about this time and may be seen in the work of men such as Mill, Sterling and Maurice. Yet the reaction which the questioning of accepted theories evoked was

not that of positive scepticism, at least not until the 1860's, rather it was one of negative scepticism, where "judgement is suspended between alternative conclusions, one of which is considered true; or the affirmation of a belief (they) only half believed - and half doubted."²⁸ It was the continuation of the old belief in some eternal, discoverable law or truth. Until the 1860's, men simply felt confused, but the possibility of finding new security was merely a question of time. Such views were expressed even by some positivists; Frederic Harrison claimed, "We are on the threshold of a great time, even if our time is not great itself."²⁹ But in this he was simply re-echoing what Carlyle had said half a century before. "The old has passed away, but, alas, the New appears not in its stead; the Time is still in pangs of travail with the New."³⁰ It would seem that the pregnancy miscarried, however, since a great proportion of literary men passed from the realms of negative scepticism to the position where they believed confusion and uncertainty to be inevitable.

The impact of Darwinianism was, in great part, responsible for this movement of thought towards scepticism, since it seemed to have undermined many established positions. But this was only one of the forces impelling men in such a direction. To understand why many

of the new theories were unacceptable to particular sections of society, we must remember that John Morley's comments upon the 'fifties and 'sixties apply equally to the greater part of the Victorian era. He said, "It was an age of science, new knowledge, searching criticism, followed by multiplied doubts and shaken beliefs."³¹ The attempts to resolve the problems dominating men's minds merely confused them even further. The sheer increase in the volume of knowledge overwhelmed many Victorians and left them baffled by its complexity and implications. In such an atmosphere, combining elements of both anxiety and confident assurance, only two courses of action remained open: for the modest man, doubt; for the presumptuous man, dogmatism. It is to this latter feature of the period that we must now turn our attention.

In the intellectual hiatus which was caused by the absence of certainty, the opportunities for the powerful ego were boundless. Not only was the barrier of orthodoxy removed, but because of the general atmosphere of wavering beliefs, support was readily given to any new prophet proclaiming knowledge of the promised land. There was a general feeling that "even error, eloquently advocated with the honest conviction that it is truth, is better than truth coldly believed in and languidly proclaimed."³² But to assume that dogmatism was simply the response of the egotists to favourable market conditions would be too crude an

interpretation, since as Houghton maintained, ". . . even the prophets themselves were often plagued with doubt, and their dogmatism was as natural as it was rhetorical."³³ In an age of conflicting theories of truth, J.S. Mill held that the will to believe gave rise to a "rather more demonstrative attitude of belief" than people thought necessary "when their personal conviction was more complete."³⁴ Dogmatism, then, whether in its literary or scientific manifestation, was in many cases the symptom of an inward fear of being mistaken in one's beliefs. It was a false confidence bred from uncertainty.

The State of Legal Theory.

Against the rich variety of social and intellectual change - indeed change in almost every aspect of life - the legal and political movements of our period must now be interpreted. The legal sphere will be examined first. In jurisprudence, as in other realms of thought, the 19th century witnessed a rapid proliferation in the number of approaches to the discipline. W.G. Friedmann has noted the major schools, "The principal legal movements which developed during the 19th century are the transcendental idealism of the German metaphysicians (which is, however, largely rooted in 18th century thought); analytical positivism, utilitarianism, historical jurisprudence, Marxist materialism and towards the end of the century, a new legal idealism."³⁵

Upon the English scene, the two movements of the greatest moment are analytical positivism and the historical school of jurisprudence: the former reflecting the scientific, materialist atmosphere of contemporary England; the latter, its romantic, mystical sentiments, although claiming science as its mantle in the post-Darwinian era.

Analytical jurisprudence, under the influence of Bentham and Austin, was the greatest and most powerful school of English law during the major part of our period. Attempting to apply Newtonian techniques to the chaotic state of English law, the Benthamites insisted that certain principles must guide all reforms. Dicey suggested that these principles might be summarised under three major headings and two corollaries. The first of these was that legislation constitutes a science. Legislative innovation must no longer follow the method of building upon precedent, custom or usage, since this merely created a hotch-potch of law devoid of any rational, unifying principle. Speaking of Bentham, Dicey said, "Legislation, in short, he proclaimed is a science based on the characteristics of human nature, and the art of law making. . ."³⁶ The particular principle which Bentham believed should be used as the basis of any scheme of legal revision was, of course, his principle of utility. This idea constitutes Dicey's second heading. The third major principle in the utilitarian approach was not logically essential to their schema, but followed from

their belief that each individual knew what was his own best interest. It was the principle of laissez-faire construed in its widest sense. In the economic and political fields all restrictions hindering free movement must be removed unless it could be shown conclusively that it was in the interest of the greater part of society. Following from this position are the two corollaries which Dicey noted: a belief that the area of freedom of contract should be extended; and the principle that one man should count for one and no more than one. Given these so-called scientific principles - principles which must be self-evident truths to all men - the material was now available for constructing a perfectly rational code of law which would prove adequate, not merely for contemporary English society, but with minor modifications for all societies at all times.

Though this system of thought had been powerful, particularly in the era surrounding the Great Reform Act, its power was beginning to wane by mid-century. Partially responsible for this decline was the increasing popularity of the historical school of jurisprudence. Although this school reached its most developed form in the 19th century, its roots extend much further into the past. J.E.G. de Montmerency has traced its origin to the 15th and 16th centuries. Referring to the historical orientation which he saw legal thought undergoing, he claimed, "Mornay's book

moreover, shows that this new outlook came with the New Learning; that the historical method in the study of law is indeed one, and not the least of the fruits of the Renaissance . . ."³⁷ Be that as it may the fruit remained to be gathered, and this achievement was mainly the accomplishment of Giovanni Vico, who published his great work Scienza Nuova in 1725. Inspired by Bacon's treatment of the natural world, he applied a similar method to human history. For Vico, "The facts of known history, . . ." are to be ". . .referred to their primitive origins, divorced from which they have seemed hitherto to possess neither a common basis, nor continuity nor coherence."³⁸ The similarity of this disposition to that of Maine will shortly become apparent, but it is unnecessary to wait until the 19th century to discover a mind similar to that of Vico. He was not entirely alone in the 18th century in the development of this new method of social analysis, the De l'Esprit des Lois of Montesquieu encroached upon similar ground. Normally this work is noted for its innovations in comparative jurisprudence - again themes which Maine was to exploit - but also, it gave impetus to the historical approach. And so, in the 18th century, despite the predominance of rationalism, the ground was being prepared for the revolt against à priori reasoning which legal theory was to experience in the 19th century.

The most immediate impetus towards historical research came from Germany, in the form of an analysis of Roman history by Niebuhr. According to Norman Sykes, "The studies of Niebuhr marked the dawn of the movement of historical criticism which has rewritten the story of European development."³⁹ True to the continuing belief in the universality of method, the new techniques used by Niebuhr were quickly applied to other branches of learning, one of which was law. The new legal historians were concerned not with the technicalities of legal systems, but with the evolution, or development of whole systems of law. The undertaking of such an enormous task resulted in the inquiries of the lawyers overlapping into other areas of study: into sociology, anthropology, and philology. To trace this influence, however, is beyond the scope of the present treatise where we must content ourselves with an examination of the purely legal side of their work.

It is understandable since the revival of historical studies found its first expression in Germany that the German lawyers should have laid the foundations of legal history. The movement was initiated by Eichhorn, whose teachings were developed and elaborated by Savigny, the most famous of Germany's legal theorists. An outline of Savigny's ideas will provide us with the main features of the whole school.

In many respects the basis of Savigny's work is very similar to that of Burke and was, like his, a reaction to the dry rationalism of the Enlightenment. It evoked the concept of national spirit and a certain mysticism with regard to the state, customs and authority. Within the romantic image which Savigny portrays, at least three major concepts emerge. The first of these suggests that law is the unconscious creation of the particular genius of a nation - its Volkgeist. Law is ". . . built solely by inheritance, transmitted by the continuous and imperceptible succession of generations . . .,"⁴⁰ and because of this, legislation must be subordinated to the customs and traditions of the country. Any attempt to codify a nation's heritage would be fatal, petrifying the existing and preventing future growth in response to the changing circumstances of society. The interpretation of the spontaneous evolution of the popular conscience, Savigny assigned to a select, highly trained, group of lawyers. The activity of this elite was necessary, so he maintained, because of the ever increasing complexity of law in the contemporary world. But he insisted this same body was merely the instrument of the Volkgeist: it was not the autonomous author of some legal code. His final principle was but an extension of his notion that law was the external manifestation of the national spirit. It was that laws are not universally valid. By virtue of his nationalism and relativism,

Savigny was at variance with the rationalist school which had been such a force throughout Europe. But it would be wrong to construe his approach as that of a reactionary sympathizer. It is true that he stressed the importance of established usage and custom, but he was equally anxious to remove any anachronisms which existed within the legal system. Once the changing conditions of society had rendered certain branches of the legal structure inappropriate, then they must be pruned away to enable the growth of new law more in accord with the requirements of the emerging spirit of the time.

Savigny's particular use of history to determine the origin of custom and tradition in a nation, is but one of the ways in which law and history may be combined. Whilst it is generally accepted that Maine owes a great deal to this particular approach, certain writers, including Friedmann, feel that he also has affinities with those who propounded a philosophy of history. This school did more than simply trace the evolution of law, it developed a legal philosophy from a philosophy of history. Not content with what mainly amounted to description, they offered explanations. This style of legal appreciation is apparent in the writings of Montesquieu, Vico, Marx and Hegel.

Maine, it is apparent then, was greatly influenced by the continental jurists. Indeed, Friedmann has said of him, "His great contribution to legal theory lies in the combination of what is best in both Montesquieu and Savigny's theories without the dangers involved in both. Maine's theory avoids the danger of an excessive disintegration of theoretical laws of evolution inherent in Montesquieu's comparative and factual approach to the development of legal institutions; but is equally free from the abstract and unreal romanticism which vitiates much of Savigny's theory about the evolution of law."⁴¹ But despite these foreign influences, his sympathies with the English analytical jurists must not be forgotten or underestimated. For Maine recognised, as so many commentators upon 19th century legal theory do not, that there could be no question of conflict between his analysis of law and that of the positivists, since for the major part of their work they were discussing different topics: on the one hand, law's historical origins; and on the other, its philosophical significance. This is a theme which it has been found necessary to develop in the main body of this thesis.

Current Political Ideas.

Such then is a brief indication of the most important legal schools forming a background to Maine's own legal studies. It now remains

for a similar account of the political environment to be presented. Any discussion of political thought in this period is confronted with the same problem which faced the examination of legal theory, namely, the great multiplicity of ideas. As Wilfred Harrison has said, "The attempt to provide an account of English political thought in this period thus presents some problems of arrangement. One cannot satisfactorily organize the great variety involved under any such simple set of labels as 'Conservative', 'Liberal', and 'Socialist': these categories overlap, and each one of them would itself have to contain considerable varieties of views of very different kinds."⁴² But since as a very broad account of political thought in this era must be presented, it is to these general categories that we must turn, bearing in mind, however, Harrison's warning about the use of such blanket terms.

Liberalism, as Bullock and Shock maintain, enjoyed a popularity unrivalled in the history of English ideas. Despite this, however, it is a very difficult movement to attempt to characterise by any slogan or principle since its content is of a nebulous nature, continually adapting itself to new demands and requirements. Given this evolving, almost organic life, the best way in which some indication of liberalism may be conveyed is to observe its more permanent features, together with some of the more important changes which have occurred within the tradition.

Particular attention will be paid to the 19th century as this provides the immediate background to Maine's work and because the changes which occurred in this period can almost be regarded as a new starting point for English liberalism.

Born in reaction to authoritarianism in religion and politics, the most constant theme of liberal thought has been its defence of individual freedom against the intrusions of government. The instruments used in defence of this position have been varied. In the 18th century, individuals had been secure behind the protection of natural law and the social contract; whilst in the 19th century, though never abandoning natural law completely, they looked to the myth of the natural harmony of interests as providing the chief means of guaranteeing individual liberty. This, however, proved to be of little value against the more ambitious interpretations of utilitarianism in which the interest of the majority was seen as coincident with the interest of all.

Amongst the other permanent aspects of liberalism is the belief that progress is the product of the free interplay of social forces. Irene Collins, for example, suggests of liberals that "Whatever twists and turns were demanded of them by the circumstances, they held at heart a simple faith: a belief that progress, leading to final perfection, could be achieved by means of free institutions."⁴³

The last of the major principles which might be mentioned is the Rule of Law. At first glance, the emphasis upon the importance of law might seem to be inconsistent with the doctrine of laissez-faire, but such an impression would be quite erroneous. The liberal belief in the overriding authority of the Rule of Law cannot conflict with the concept of freedom since they believed in freedom under the law and not in any anarchical idea of freedom independent of law. The very idea that there could be a genuine conflict between them is clearly an error, for as Lippmann said, ". . . all freedom, all rights, all property are sustained by some kind of Law. So the question can never arise whether there should be law here and no law there, but only what law shall prevail everywhere."⁴⁴ This almost mystical idea of the Rule of Law has certain affinities with the notion of Natural Law. It ensured that no person could be deprived of property or liberty unless proved guilty of infringing, after a fair trial, the duly constituted law of the country; and perhaps most important, that all men are equal before the law, including those within the governing body itself.

These general beliefs in the sanctity of the individual, gradualism, progress, Rule of Law etc., formed, in the varying interpretations to which they were subjected, the basic liberal creed: the principles upon which the " " good society was to be achieved. In the 19th century, this general disposition found expression in specific demands. Collins

suggests the following: "The individual can best achieve his own welfare through the welfare of all. No individual can know what is the welfare of all, so some political system must be devised which allows the voice of each individual to be heard. Essential features of such a political system are: a freely elected parliament, to deliberate upon the laws; a ministry dependent on that parliament to carry out the laws; a judicature entirely independent of other branches of government, to deal with offenders against the laws; freedom of speech, freedom of religion, freedom from arbitrary arrest, freedom for the individual to enter any trade or profession according to his ability, freedom for the individual to accumulate property and possess it in safety. In this way the individual can find his fullest expression and will be able to grow in that essential goodness which leads to perfection."⁴⁵

It has been suggested that there was a significant reorientation in the liberal tradition during the 19th century and it will now be of value to observe this change in emphasis. But before proceeding, it must be stressed that the change was not simply the replacing of certain ideas by a series of new ones. Rather it was the gradual adoption of concepts which were then integrated into the tradition; whilst older notions, which were becoming anachronistic, were allowed to fall into the background.

One of the important changes occurring in the 19th century concerned the basis from which individual freedom was defended. It was the substitution of socially recognised rights for the 18th century concept of natural right. The anarchical tendencies inherent in the founding of rights in nature proved unsuited to the sympathies of the middle classes who constituted the main body of liberal supporters. Consequently, liberals moved towards the concept of civil rights whereby individual claims became rights when recognised by the state; outside this area no rights existed, only expectations.

A second change is ". . . the emphasis on the individual rather than the people."⁴⁶ The idea of the people as anything more than the aggregate of individuals comprising society had never found much support in English liberalism. But in England, as on the continent, there was an increasing emphasis on the individual rather than on the majority will. The classical statement of this new liberalism being, of course, J.S. Mill's On Liberty. The will of the sovereign had to be reconciled with the rights of the individual.

These new positions cannot be regarded, in any sense, as final statements of the liberal doctrine. Indeed, such views have been described as transitory stopgaps in the progress towards a form of collectivism of a socialist kind. The conditions of the times;

depression in the seventies, the social reports of men like Booth and Rowntree, and the breakdown of the classical model economy, owing to the rise of trusts and monopolies, led to new thinking in liberal circles. The abstract individual and his negative freedom which Mill had depicted was replaced by the more appropriate individual of Green's philosophy. He was a man who required the positive assistance of the state if his rights were to be secured. The emphasis of the new position was placed on the whole community. "Instead of starting from a central individual, to whom the social system is supposed to be adjusted, the idealist starts from a central social system, in which the individual must find his appointed orbit of duty."⁴⁷ Individual rights and values are still to be respected; indeed, Green hoped that the circumstances for individual moral development would be greatly improved. But since these were inseparable from the community itself, then, the social body must be the centre of interest. It was by adjusting the conditions of society that the opportunity for the individual could be secured. Without government intervention in this direction, individuality could be crushed beneath the wheels of the new industrial society.

This interpretation appeared to be a far remove from the traditional liberal position. The result was a split within their ranks. The 'old liberals', of whom Roach claims Maine to be one of the most powerful

exponents, held on to their belief in the values of laissez-faire and the doctrines of liberalism which had been formed in the 18th century. They refused to recognise the new circumstances in which they moved. Many of these liberals drifted into the ranks of the Conservative Party, although, paradoxically, they were far to the right of the main body of its members. Laissez-faire then, became, as every progressive doctrine must, once its principles have been realized, a reactionary dogma. On the other hand, the new liberal position seemed for many to find its logical development only in some form of socialism. Mill himself had claimed in his autobiography that he was a socialist. There was, in fact, a drain of support from liberalism to socialism. Thus the image of liberalism in the closing decades of the last century was one of gradual disintegration.

The conservative tradition plays such an important role in understanding Maine's political thought that it can be more profitably dealt with in the chapter on Popular Government. It is worth remembering, however, that conservatism suffered the same tensions which we noted in liberalism. This can be seen in the differing emphases apparent in practical politics rather than in theoretical discourse. Resignations from the Cabinet and general resentment within the party against the various innovations made by Disraeli are symptomatic of 'old Tory' elements

inherent in Conservatism. On the other hand, the phenomenon of the Fourth Party in the 1880's represented the more progressive sections, which were advocating reforms based on radical principles and anticipating political demands rather than waiting for them to mature. Both the main movements in English politics were thus faced with the same problem of overcoming natural inertia in order to keep abreast of social requirements on the one hand, while restraining radical tendencies on the other, so that some continuity in their respective traditions might be maintained.

Whilst members of the main traditions of thought were attempting to accommodate themselves to changing circumstances, the more radical members of society were trying to increase the velocity of social change in order that certain goals might be secured. Many of the objectives of these groups have now been realized, but it cannot be said that they have contributed any profound or detailed ideas to political thought. As Derry has said, "The Radical tradition is as much an affair of agitation and organisation as of political theory."⁴⁸ Perhaps the greatest difficulty concerning the discussion of radicalism is to define the area covered by this term. At one extreme, in the form of radicalism represented by William Cobbett, it merges into the area usually associated with conservative romanticism; whilst at the other, it becomes confused with the various strands of English socialism.

One of the important features of radicalism - still deep in the shadow of 18th century Jacobinism - was its faith in democracy. Only through universal suffrage could the goals of liberty, equality and fraternity be secured. This conflicted with the predominant liberal belief in some form of hierarchy to ensure order, stability and freedom from the tyranny of majority rule. To secure the ends of democracy many radicals felt that it was essential to destroy the monarchical system of government and create a republic in its stead. The removal of the formal institution of the old world would prove ineffective, however, if the traditional hierarchy was to survive by virtue of its wealth. To overcome such possibilities, heavy duties and steeply graduated income tax were advocated.

Another development following from the achievement of a majority government would be the implementation of state education. Whilst many liberals felt that this was a field best left to private initiative, the radicals insisted that compulsory primary education was necessary to secure equal opportunity for every member of society. It is interesting to note that the arguments used to defend this position were not simply those of extreme utilitarianism, but frequently involved the idea of natural rights. As Professor Ritchie said, "Recent experience has, however, convinced me that the theory [of Natural Rights] is still in a

sense, alive, or at least capable of mischief. Though disclaimed by almost all our more careful writers on politics and ethics, it yet remains a commonplace of newspaper and the platform . . ."49 Such a conviction echoes the opinions expressed at an earlier date by Maine.

Perhaps the best summary of radical belief can be found in the 'six points' of the People's Charter of 1838. "It called for universal male (not female) suffrage; equal electoral districts; removal of property qualifications for members of Parliament; payment of members of Parliament; secret ballot; and annual general elections."50

To complete the political background to Popular Government, it is now appropriate that our attention be turned to the nature of socialism during this period. For, "If Mill offered the most important contribution to political thinking in the first half of the reign, the most striking feature of the second half was the rise of socialism."51

The origins of English socialism can be traced beyond the Diggers and Levellers of the time of the Civil War, but to trace the whole development of the tradition does not constitute our present purpose. It will be sufficient simply to indicate the growth of socialist thought in the 19th century.

The first figure of importance, although it is probably true that he simply gave expression and popularity to the opinions of William

Godwin was the successful industrialist, Robert Owen. His main contribution to the socialist tradition lay in his stressing the importance of environment in creating a good society. A policy of laissez-faire degraded both worker and employer alike; it was wasteful, inefficient and inhuman. By social engineering the vicious application of laws of supply and demand could be replaced by the beneficent operation of the laws of harmony and co-operation. A new system of exchange founded on the labour theory of value would ensure an efficient distribution of goods by basing price on the cost of production, and by removing the profit of the middleman. The means of production in Owen's utopia were to be collectively owned to ensure that the evils associated with the profit motive were excluded. In such an idyllic association, the emergence of complete, contented human beings, devoid of all vices, would be but a matter of time.

Owen, despite the dull repetitive nature of his theoretical work was perhaps the most influential socialist of his time. But he was not alone in the expression of such views. Many of the more extreme utilitarians, Thomson, Grey and Brey, found their way into the socialist ranks. They had arrived at socialism as a result of an emphasis upon equality, rather than security, in the interpretation of the principle of utility. There was, however, among some of these men, Brey in particular, a class attitude which was totally absent in Owen. Owen wanted to

secure his communist society by means of middle class values: he was completely against the ideas of class war, strikes and violence. He believed that the transformation of the world could be brought about by education. Brey saw the political naivety of such views and advocated class solidarity and violence to capture the means of production for the community. In many areas, the English socialists anticipated Marx, although they did not enjoy his historical understanding.

The permeation of working class opinion by socialist ideas continued throughout our period. They were promulgated by Kingsley, Maurice, Ruskin and Morris. Marx and Engels, even though residing in England, had little direct impact upon the native working-class movements, although two organisations expounding Marxist views were founded. They were the Democratic Federation founded in 1881, which later became the Social Democratic Federation, and a splinter group which, in 1884, became the separate Socialist League. It was, however, in the same year that a more important body than either of these purely Marxist organisations was established, namely the Fabian Society. It was the members of this society who gave socialist ideas a firm place in English politics.

According to Wilfred Harrison, "The avowed task of this group was to bring socialist theory up to date, to free it from notions of unavoidable class struggle and revolution, and to base it not on utopian

or anarchist ideas, but on the recognition that modern government was very compatible indeed with social reforms."⁵² This constitutional approach to reform was fundamental to the influence which the Fabians were able to exert in British politics, since it was quite clear that the majority of men were opposed to any form of violent revolution. As Webb put it, ". . . Socialists as well as Individualists, realise that important organic changes can only be (1) democratic and thus acceptable to a majority of the people and prepared for in the minds of all; (2) gradual, and thus causing no dislocation, however rapid may be the rate of progress; (3) not regarded as immoral by the mass of the people, and thus not subjectively demoralising to them; and (4) in this country at any rate, constitutional and peaceful."⁵³ To remedy the evils of capitalist production and the unearned increments from land and capital, a system of social ownership was advocated. In place of the anarchy of laissez-faire, the Fabians proposed the adoption of a planned economy. Socialists were simply to take over the control of the capitalist machine. They were not to destroy it, but use it for the interest of the community rather than for private gain.

Finally, two further assumptions which underlay the Fabian position must be mentioned: the belief in science, and the belief in the centralised state. Accepting the evolutionary themes of the time, the Fabians were

convinced that the advent of socialism was inevitable. It was to be the product of social evolution. Not only did science forecast the arrival of socialism, it also was crucial to the administration of the new society. The Fabians neglected the real nature of politics - the process of discussion and compromise - they were more concerned with planning. Although they claimed they were democrats, they had more faith in experts than in the common people. They thought of the state as a machine which must have its operators - an elite trained in the science of government. The mass of society simply had to be organised and administered in their own best interest, and all would be well.

Criticism of the Fabian position is not required, but it will become apparent that many of the principles which Fabians adopted had been the subject of Maine's censure long before they had received this later systematic exposition.

With this brief mention of one of the most important forms of rationalism in English political thought, our general introduction to Maine's work may be concluded. It remains now for a detailed examination of his position to be undertaken against this background which we have sketched.

REFERENCES

INTRODUCTION

Chapter One : References

<u>Page</u>	<u>Ref. No.</u>	<u>References</u>
1	1	'Liberalism and the Victorian Intelligentsia'; J. Roach; <u>Cambridge Historical Journal</u> . 13. 1957; p. 75.
1	2	'Sir Henry Maine'; K.B. Smellie; in <u>Encyclopedia of Social Science</u> ; vol. IX; p. 49.
2	3	<u>Political Thought in England 1848-1914</u> ; Sir Ernest Barker; p. 8.
6	4	<u>Politics and Opinion in the Nineteenth Century</u> ; J. Bowle; p. 16.
7	5	<u>England in the Nineteenth Century</u> ; D. Thomson; p. 33.
8	6	<u>Science and the Modern World</u> ; A. N. Whitehead; p. 120.
9	7	<u>A Concise Economic History of Britain From 1750 to Recent Times</u> ; W.H.B. Court; p. 317.
9	8	<u>ibid.</u> , p. 165.
10	9	<u>ibid.</u> , p. 162.
10	10	Thompson, <u>op.cit.</u> , p. 137.
12	11	'History and Politics'; F.A. Hayek; in <u>Capitalism and the Historians</u> ; p. 16.
12	12	Court, <u>op.cit.</u> , p. 231.

Chapter One : References

<u>page</u>	<u>ref. no.</u>	<u>references</u>
13	13	Thomson, <u>op.cit.</u> , p. 68.
15	14	'The Age of Reaction and Reconstruction'; N. Sykes; in <u>The Social and Political Ideas of the Age of Reaction and Reconstruction</u> , p. 18.
15	15	<u>Public Order in the Age of the Chartists</u> ; F.C. Mathar; p. 6.
15	16	<u>ibid.</u> , p. 12.
16	17	<u>ibid.</u> , p. 13.
16	18	<u>ibid.</u> , p. 21.
18	19	<u>ibid.</u> , p. 2.
19	20	<u>British Conservatism 1832-1914</u> ; R.B. McDowell; p. 18.
19	21	<u>ibid.</u> , p. 19.
19	22	<u>ibid.</u> , p. 19.
20	23	'The Victorian Age 1837-1901'; G.P. Gooch; in <u>Social and Political Ideas of the Victorian Age</u> ; p. 11.
24	24	Thomson, <u>op.cit.</u> , p. 29.
27	25	Whitehead, <u>op.cit.</u> , p. 119.
28	26	Gooch, <u>op.cit.</u> , p. 25.
29	27	'Science, Religion, and the Critical Mind: Introduction'; N. Annan; in <u>1859: Entering an Age of Crisis</u> ; p. 34.

Chapter One : References

<u>page</u>	<u>ref. no.</u>	<u>references</u>
31	28	<u>The Victorian Frame of Mind 1830-1870</u> ; W.E. Houghton; p. 18.
31	29	' <u>The Nineteenth Century</u> '; in <u>The Choice of Books and Other Literary Pieces</u> ; Frederic Harrison; p. 425.
31	30	Quoted in Houghton, <u>op.cit.</u> , p. 9.
32	31	Quoted in Houghton, <u>ibid.</u> , p. 11.
32	32	Quoted in Houghton, <u>ibid.</u> , p. 155.
33	33	<u>ibid.</u> , p. 155.
33	34	<u>ibid.</u> , p. 156.
33	35	<u>Legal Theory</u> ; W. Friedmann; p. 133.
34	36	<u>Lectures on the relation between Law and Public Opinion in England during the Nineteenth Century</u> ; A.V. Dicey; p. 136.
36	37	' <u>Sir Henry Maine and the Historical Jurists</u> '; J.E.G. de Montmorency; in <u>Social and Political Ideas of the Victorian Age</u> ; p. 87.
36	38	<u>To the Finland Station : A Study in the Writing and Acting of History</u> ; Edmund Wilson; p. 11.
37	39	Sykes, <u>op.cit.</u> , p. 26.
38	40	<u>The Sociology of Law</u> ; G.D. Gurvitch; p. 168.
40	41	Friedmann, <u>op.cit.</u> , p. 141.

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<u>page</u>	<u>ref. no.</u>	<u>references</u>
41	42	<u>Conflict and Compromise: History of Britain Political Thought 1593-1900</u> ; W. Harrison; p. 160.
42	43	<u>Liberalism in Nineteenth Century Europe</u> ; I. Collins; p. 4.
43	44	<u>The Good Society</u> ; W. Lippmann; p. 186.
44	45	Collins, <u>op.cit.</u> , p. 8.
45	46	<u>ibid.</u> , p. 9.
46	47	Barker, <u>op.cit.</u> , p. 5.
48	48	<u>The Radical Tradition</u> ; J. Derry; p. 10.
50	49	<u>Natural Rights</u> ; D.G. Ritchie; p. ix.
50	50	Thomson, <u>op.cit.</u> , p. 84.
50	51	Gooch, <u>op.cit.</u> , p. 20.
53	52	Harrison, W., <u>op.cit.</u> , p. 227.
53	53	'The Basis of Socialism: Historic'; S. Webb; in <u>Fabian Essays in Socialism</u> ; p. 35.

CHAPTER TWO

CHAPTER TWO

JURISPRUDENCE

THE OBJECT OF MAINE'S STUDY

Maine's professed intentions in Ancient Law were immediately stated in his preface as follows:

The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought.¹

He proceeded to emphasize the importance of Roman law in such an analysis since it embraced both ancient and modern notions of law, but he was careful to make it quite clear that he was in no sense offering a study of the evolution of Roman legal theory. Roman law simply provided a useful model for correlating primitive concepts with their first appearance in modern form - a convenient system for tracing the evolution of ideas.

The examination of man's earliest social organisation and its subsequent evolution, was, Maine believed, the only means by which a comprehensive understanding of progressive civilisation could be secured. However, such an undertaking, even when one considered the small number of societies which could be called 'progressive', was beyond the capabilities of a single individual. Consequently, Maine felt that the most profitable area of re-

search lay in the investigation of ancient society. The justification for this belief is of a two fold nature. In the first place, by exposing the character of primeval society, the subsequent investigations into later periods could be seen within a more meaningful framework - a framework which not only informed the understanding, but directed inquires into the most significant areas. But Maine was not merely concerned with building the foundations upon which the history of civilisation could be constructed. His second, and perhaps more important reason for this belief, was that the simple generalisations made in the early stages of man's social experience could be seen as the essence of their modern counterparts, and as such were capable of providing a key with which the frightening complexity of contemporary civilisation could be made more meaningful. The comparison of ancient and modern concepts was thus an analytical method, an instrument of sociological investigation, which would enable a greater awareness of the here and now.

The character of contemporary jurisprudence, and the continued reliance on Natural Law in particular, provided further encouragement in directing the location of Maine's research. The assumption of a 'state of nature' remained an obstacle to scientific jurisprudence: whether accepted as a historical or philosophical fact, it detracted attention from the detailed historical analysis of society. Not only did this result

in an inadequate understanding of jurisprudence, but in its modern interpretation, Natural Law provided a dangerous basis for legislation. Only by presenting the picture of man's ancient social organisation, as suggested by empirical evidence, could the inappropriateness, and hence the dangers, of using the concept of nature as a basis of jurisprudence be exposed.

The following quotations from Maine may be used to emphasize this limited nature of his legal investigations. In his discussion of the 'Early History of Property', he wrote:

The influence of Courts of Law and of their procedure upon Property has been most extensive, but the subject is too large for the dimensions of this treatise, and would carry us further down the course of legal history than is consistent with its scheme.²

And again in the discussion of the 'Early History of Contract', he noted:

The vast influence of the specific jurisprudence of Contract produced by the Romans upon the corresponding department of modern law belongs rather to the history of mature jurisprudence than to a treatise like the present.³

The major part of the analysis in Maine's historical inquiries was concentrated upon the presentation of the details of man's earliest social life. But it must be repeated that this was regarded as the first step towards a scientific appreciation of contemporary civilisation.

References to this ulterior objective can be seen throughout Ancient Law. Frequent comparisons are made between the original and current ideas on specific issues such as contract or will. Clearly these are meant to be indicative of the value of the kind of analysis he was advocating for society as a whole. Besides this, however, his introductory chapters are designed to undermine the alternative explanations of the evolution of modern society, whether in the guise of utilitarianism or Natural Law, with the object of clearing the ground for the reception of his own historical account. The study of the past was thus in no sense an escape from the complexities of the modern world, as far as Maine was concerned, the past was the only material in which a true image of the present could be reflected.

THE STRUCTURE OF MAINE'S ARGUMENT

The actual structure of the argument is perfectly compatible with the object of the work. This begins with an introduction to the character of primitive law. Firstly, he describes a condition of society where law has not achieved any form of permanent expression. The only known law is the ex post facto judgement of the ruler; law is 'in the air', a mere 'habit', as yet to reach even the plane of custom. This idea that divinely inspired judgement precedes the customary law stage was

something quite new and illustrated Maine's divergence from his German masters. He maintained that time and the succession of the aristocracy to the pre-eminent position in society, led to this second stage in the evolution of law. This was the only true period of unwritten or customary law; a system dependent upon the knowledge and learning of a class of guardian aristocrats. The impact of the art of writing, however, ushered in the opening of the third and crucial stage - the period of codification. Maine suggested that, although the evidence showed all societies to pass through such a process, the actual moment, relative to social development, was of vital importance. If its institution was late in a community's growth, then there was a very real danger that the customs had been corrupted by irrational superstitions. He held:

. . . unhappily there is a law of development which ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that usage which is reasonable generates usage which is unreasonable.⁴

The civilisations of the East are the great examples of a relatively late stage in the realization of a legal code. The delay meant that irrationalities and superstitions, which had eventually surrounded reasonable practices, were now given permanent expression in the legal code itself, since this usually amounted to a rationalisation of existing law. The consequence of this action had been ossifying, it produced what Maine referred to as a 'stationary' civilisation, Although there had been some

change, there had been no progress - that specialization and increasing complexity of ideas which characterised the western world. As he said, "There has been material civilisation, but, instead of civilisation expanding the law, the law has limited the civilisation."⁵

Fortunately for the progress of Roman civilisation, its code was secured remarkably early in the process of development and so avoided all these dangers. Indeed, Maine does not suggest that without the early realization of a codified system of law, the Romans, like the Hindoos, would have been 'condemned' to a 'feeble and perverted' civilisation; he does, however, insist that their code exempted them from the very possibility of such a calamity. Such is the importance of the codes, then, that Maine sees them as determining a society's whole future course of development.

In the few societies which escaped these numerous snares along the path of progress, the activity of harmonizing the structure of the legal system with the continual generation of social necessities, became self-conscious. Whereas customary usage had been imperceptibly accommodated to new circumstances, their registration in permanent form in the written Code, necessitated a process of overt response and interpretation.

In the era prior to codification, Maine recognised three stages of development: those of Fiction, Equity and Legislation, but he conceded that the stages were not mutually exclusive. Certain legal systems might have escaped the influence of any one of them. He insisted, however, that

the historical order in which these agencies had appeared had never been other than he had indicated.

A few brief remarks upon fictions and legislation sufficed, but the discussion of equity was prolonged since it was the médium through which the Greek concept of 'Nature' had been introduced into Roman legal thought. Maine's attitude towards both the ancient and modern interpretations of Natural Law theory is very illuminating and is examined fully below. It is perhaps enough, at this point, simply to indicate the importance which Maine attached to this concept.

The ground thus prepared, Maine proceeded to examine all the major branches of law as reflected in primitive communities. Beginning with the Law of Persons, he discussed Succession, Property, Contract, Delict and Crime. In each case, the major part of the analysis was concerned with describing the various developments of a concept, from its basic form to the point in Roman Law that it achieved its "modern" characteristics.

MAINE'S ANALYSIS OF CONTEMPORARY THEORY

This general schema provides the framework in which the important contribution to knowledge made by Maine can be seen. But before outlining his own position, it will be helpful to determine his disposition

towards the contemporary systems of jurisprudence as expressed in Ancient Law. These might best be subsumed under two headings: 'positive, non-historical social analysis' and 'Natural Law'.

Utilitarianism.

The work of Bentham and Austin might be taken as representative of the first category, since their system of thought was prominent in jurisprudence for most of the 19th century. Maine said of the prevalent mode of investigation:

The favourite occupation of active minds at the present, and the one which answers to the speculations of our forefathers on the origin of the social state, is the analysis of society as it exists and moves before our eyes; but, through omitting to call in the assistance of history, this analysis too often degenerates into an idle exercise of curiosity, and is especially apt to incapacitate the inquirer from comprehending states of society which differ considerably from that to which he is accustomed. The mistake of judging the men of other periods by the morality of our own day has its parallel in the mistake of supposing that every wheel and bolt in the modern social machine had its counterpart in more rudimentary societies.⁶

Not only does this show where Maine considered the inadequacies of contemporary inquiries lay, but it gives a valuable insight into his own understanding of historical investigation. He recognised the danger, for example, of reading present concepts back into past situations, and consequently, of making generalisations of a too ambitious nature.

Even so, Maine had great respect for the utilitarian explanation in jurisprudence. It approached the problem of understanding law and society from a 'scientific' point of view. It examined the evidence and accordingly made its generalisations. But, because analytical jurisprudence was concerned solely with present society, Maine felt that an important area of relevant facts was being neglected, the whole history of previous civilisation. Consequently, any generalisations from the analytical lawyers could only be true of existing societies, and even here, he saw that the use of history might have modified their conclusions. He agreed with much of their analysis, including the breakdown of a law into a class of actions, governed by the concepts of command, obligation and sanction. Indeed, he maintained that:

The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs.⁷

Nevertheless, he believed that the further we penetrate into primitive society, the less readily is the utilitarian thesis applicable. In the earliest societies, law, as noted, is still 'in the air', and has no concept of generality, command or even of sanction in the Austinian sense.

Maine's position regarding the analytical jurists seems to have been that, whilst accepting their work as a valid interpretation of the nature and operation of contemporary jurisprudence, it sustained only a verbal truth as a universal historical theory.

To retain the Austinian analysis, whilst adding to it a description of how that society has evolved, is logically quite consistent. The Bentham-Austin analysis was primarily concerned with examining the usage of law - how the established system functioned. For them, history was an irrelevance, they were concerned solely with the present. Austin required an understanding of the law as a means to rationalising it into a coherent whole: Bentham, as a means to greater legislative efficiency. Maine, too, was concerned with understanding the legal system, but rather than simply examining the logical presuppositions of society and its legal structure, he preferred to approach the problem with the assistance of history. He felt that a comprehensive understanding of the present entailed the examination of its historical antecedents. Although the two systems were not totally exclusive they can best be recognised as providing solutions to two different questions. The question the utilitarians were concerned with was the nature of all scientific interrogatives, namely, how the legal system worked. For Maine, the question was why the system had taken the particular form it had.

Natural Law.

The second scheme of thought which constituted the popular understanding of jurisprudence was based upon the concept of Natural Law. Maine attached such importance to this aspect of thought that it will be useful to follow the whole of his examination of this issue. His analysis falls into two broad parts: the utilisation of the idea of 'natura' in ancient Roman theory and the modern interpretation of the English and French contractualists.

Maine began the examination of the Roman notion by describing the generation of 'Jus Gentium' or law common to all nations. With the increasing intercourse of Rome with other polities, disputes arose between aliens and Roman citizens. Roman Quiritarian Law was quite incompetent to deal with such cases, as it was applicable only to the citizen class. Consequently, rather than allow disputes to be settled by strife and so threaten the security of society, a system was devised of selecting the rules of law common to the various institutions which prevailed among the Italian tribes. In this way a common law was developed which applied to all cases involving non-Roman citizens. There was to begin with, Maine suggested, little respect for this make-shift system of law. But all this was transformed, indeed revolutionised, by the introduction of the Stoic philosophy of nature. It changed the character of 'Jus Gentium' from that of a mere expedient into an ideal standard of jurisprudence. Eventually, by means

of the Praetor's Edict, the complete fusion of the two notions was achieved. As Maine said, "The Jus Naturale, or Law of Nature, is simply the Jus Gentium or Law of Nations seen in the light of a peculiar theory."⁸

The manner in which the welding together of these two ideas took place seems to have been quite fortuitous. After showing the origin of the Greek concept of nature as being the notion of a single principle underlying and indeed unifying the whole physical world, Maine suggested that this came to be applied to the moral universe. That is, all actions were considered as resolvable into some kind of primary law or general principle, which underlay all the superficialities of ordinary life. To live according to this principle, the principle of nature, became the main tenet of the Stoic philosophy which made such an impact upon Roman thought.

Under the pressure of this new climate of opinion, it was not long before that process of "levelling" continued by the Praetors in the sphere of Equity, became identified with the simple life advocated by the new morality. The function of the Praetor was seen in a different light - it was now viewed as the recovery of the lost Code of Nature.

This approach provided a great stimulus to the improvement of legal theory. The ideas of universality and harmony, the basic precepts of Nature, became the ideals of the legal system. Excessive formality,

involved language and multiplied ceremonies were swept away in this pursuit of simplicity, symmetry and intelligibility. Maine concluded that:

I know no reason why the law of the Romans should be superior to the law of the Hindoos, unless the theory of Natural Law had given it a type of excellence different from the usual one. In this one exceptional instance simplicity and symmetry were kept before the eyes of a society whose influence on mankind was destined to be prodigious from other causes, as the characteristics of an ideal and absolutely perfect law.⁹

But, although the ideal of Natural Law provided vital guidance in the pursuit of improvement - a function, Maine suggested, performed by the principle of utility in the modern world - he saw that it did not exhibit any philosophical precision. It was, he said, "one of those 'mixed modes of thought'"¹⁰, confusing the past with the present. Theoretically the dictates of Natural Law were derived from a logically implied state of nature, although in practice such a procedure was ignored by the jurists. They continued, as had been their practice before the philosophical concept of nature had been grafted onto their activities, to concern themselves with the adjustment of law to the changing conditions of society.

Natural Law for all practical purposes, was something belonging to the present, something entwined with existing institutions, something which could be distinguished from them by a competent observer. The test which separated the ordinances of Nature from the gross ingredients with which they were mingled was a sense of simplicity and harmony; yet it was not on account of their simplicity and harmony that these finer elements were primarily respected, but on the score of their descent from the aboriginal reign of Nature.¹¹

The perceptive analysis of the Roman method of realizing the principles of nature is important in an appreciation of Maine's sympathy with the process. As it operated, Roman Natural Law was essentially anti-rationalistic. The philosophy of nature simply provided a sanction for a process of levelling and rationalisation which was already taking place throughout the ancient world. It was true that improvements came to be couched in terms of the principles of nature, but they were of a very different character from the prescriptions derived from an ideological system. The actual principles of 'simplicity and harmony', like their modern counterpart the utility principle, merely suggested a general justification for change. It did not imply any specific action or the pursuit of a scheme. The framework it provided simply presented a structure upon which the empirical task of building the law in response to the demands of a progressive society could proceed in an orderly manner.

Despite reservations regarding the theoretical pretensions of the Roman interpretation of Natural Law, Maine was sympathetic with their practical application of this concept. His disposition towards every aspect of its modern appreciation, however, was of a much more hostile character. The following quotation not only links his ancient and modern analyses, but also foreshadows his disenchantment with modern rationalism. Speaking of the Roman 'Jus Naturale', he said,

It is important too to observe that this model system, unlike many of those which have mocked men's hopes in later days, was not entirely the product of imagination. It was never thought of as founded on quite untested principles. The notion was that it underlay existing law and must be looked for through it. Its functions were in short remedial, not revolutionary or anarchical. And this, unfortunately, is the exact point at which the modern view of a Law of Nature has often ceased to resemble the ancient.¹²

Thus, although the idea of a Natural Law had retained its importance in the history of thought, the more influential modern interpretation of that theory was something quite different from that possessed by the Romans.

Theorizing upon a natural state of man constituted a common factor among political writers in the 17th and 18th centuries. The object of this analysis fell broadly into two categories: one, basically explanatory; the other, mainly prescriptive. Out of the many writers suitably classified under such titles, Maine took the English contractualists, Hobbes and Locke, as representative of the explanatory group; Rousseau, as the major figure in the prescriptive section.

Maine considered that the English writers had realized the true nature of the problem involved in understanding jurisprudence and political society. They had recognised it as a question of appreciating the evolution of contemporary concepts from their original source. But, rather than enjoin in the labour of examining complex historical data, these writers fell back ". . . on some ingenious conjecture which (plausibly interpreted)

will seem to reconcile everything. . . "13 The 'conjecture' to which Maine was referring was the idea of a primitive State of Nature - an idea derived, consciously or unconsciously, from Roman Law. Although Hobbes and Locke differed on the actual nature of the pre-social state and the details regarding the social contract by which man took his great step forward into civil society, they were agreed that such an account was the only manner in which cognition of the totality of their political experience was possible.

Rousseau's concern with the State of Nature, however, was not simply to facilitate an understanding of contemporary society, he felt that it was an ideal to guide political action. The present civilisation represented the degeneracy of mankind and as such justified its own condemnation. It was the Christian thesis of the fall of man transformed into the language of humanism: the 'Civitas Dei', the goal of salvation, became an ideal to be realized as an earthly heaven - the goal of political life.

Even so, all these political writers, regardless of their different purposes, concentrated their analyses on the primitive state of mankind, rather than searching for the prescriptions or explanations of Natural Law among existing institutions. Basically, it was still the Roman theory of 'natura' but, ". . . the theory is, as it were, turned upside down. It is not the Law of Nature, but the State of Nature which

is now the primary subject of contemplation."¹⁴ The concept of nature provided the modern world with both a guide to action and an explanation of the present, as it had done for the Romans; but now, much greater precision was ascribed to it and to this extent, the two positions had little in common.

Now that some indication has been given of the modern function performed by Natural Law, it is important that some reference be made to the logical status of the concept. It is of no little consequence to determine whether Maine considered the idea to be a historical or a philosophical truth. Indeed the whole value of his analysis rests upon the status he attached to 'nature'. A prima facie examination of his position would suggest a certain amount of confusion at this point. Not only do many of his statements appear inconsistent, or even contradictory, but he readily confessed his difficulties in respect of determining the contractualists' intentions. For example, Maine admitted the problem of deciding the classification of the code of law which the Publicists derived from the necessary conditions of a State of Nature.

In studying these writers, the great difficulty is always to discover whether they are discussing law or morality - whether the state of international relations they describe is actual or ideal - whether they lay down that which is, or that which, in their opinion, ought to be.¹⁵

But the most frank statement of Maine's difficulties in this field occur not in Ancient Law but in Popular Government, when discussing Rousseau's

Social Contract Theory. He wrote:

The "Contract Social", which sets forth the political theory on which I am engaged, appears at first sight to give a historical account of the emergence of mankind from a State of Nature. But whether it is meant that mankind did emerge in this way, whether the writer believes that only a happily circumstanced part of the human race had this experience, or whether he thinks that Nature, a beneficent legislatress, intended all men to have it, but that her objects were defeated, it is quite impossible to say with any confidence.* The language of Rousseau sometimes suggests that he meant his picture of early social transformations to be regarded as imaginary; but nevertheless the account given of them is so precise, detailed and logically built up, that it is quite inconceivable its author should not have intended to express realities.¹⁶

In his footnote to this passage, Maine suggested that the reason for Rousseau's very great influence upon modern thought was because his followers believed ". . . his account of natural and of early political society was literally true."

But though he saw that difficulties were involved in this topic, Maine's position was consistent throughout: a proper appreciation of his attitude resolves all the major anomalies. He felt that the new emphasis upon the original state of man in Natural Law had been generated in England, first by Hobbes and continued in the work of John Locke. The thesis of a contractual source of law and society was a particularly attractive argument to use against the divine parentage of Imperative Law in an age when

* my italics

the old order of community was crumbling away to reveal the individual as the new unit of political and legal responsibility. Indeed, the new theory provided a recognition of the new order of society. In the place of the mediaeval notion of hierarchy and station, of privilege and duty, of family and property; ideas appropriate to the rights and duties of individual men had more appeal.

The speculative theories of Hobbes and Locke provided an acceptable account of the new conditions. But Maine suggested that, although they were conceived as *à priori* explanations, the theories were understood to be invested with historical validity. As he said:

In another stage of thought, they would have been satisfied to leave their theory in the condition of an ingenious hypothesis or a convenient verbal formula. But that was an age under the dominion of legal superstitions. The State of Nature had been talked about till it had ceased to be regarded as paradoxical, and hence it seemed easy to give a fallacious reality and definiteness to the contractual origin of Law by insisting on the Social Compact as historical fact.¹⁷

Maine considered that this extension of the theory had been an error and it was an error which was not confined to England. Its 'most systematic form' was to be found in Rousseau's Social Contract. Possibly the disposition of 18th century French thinkers to regard history simply as the illustration of certain general propositions, either assumed or believed to be proved *à priori*, led Rousseau to accept more readily the

historical validity of the English argument. Maine's belief that Rousseau considered the Social Compact to be a historical fact has been noted in the quotation from Popular Government. He had, however, arrived at this position in his first work, Ancient Law. The evidence was particularly clear, for example, when he noted Rousseau's belief that the 'veracity and good faith' of the ancient Persians were 'traits of primitive innocence which have been gradually obliterated by civilisation'.¹⁸

Regarding the logical position of the State of Nature, then, Maine saw the theory as being in essence a philosophical account, but that the circumstances of the intellectual climate had transformed it into a historical description. Clearly, however, there can be no doubt that he was perfectly aware of the distinction between a historical theory, based upon empirical data, and a logical or metaphysical theory, which transcended actual events.

MAINE'S ATTACK ON NATURAL LAW

Some time has been spent in an effort to clarify Maine's position on this question, since it is of no little importance in evaluating his attack on the prevalent theories of jurisprudence. If he had considered the Social Contract theory as purely a philosophical account of the origin and nature of society, then one might agree with Sir Ernest Barker that

Maine's attack upon it, from a historical position, was to commit a serious logical error.¹⁹ But it has been demonstrated that, although philosophical in conception, some authors of the Social Compact believed it to be historically true. Consequently, Maine was justified in attacking the thesis in this form as being invalid. By suggesting that society had originated by men joining together in a contractual agreement, a relatively late legal development, the Natural Law theorists had committed an error which Maine found throughout the branches of social discourse, namely reading history backwards.

These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the conditions thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated,—although, in fact, these sentiments may have been created and engendered by those very circumstances of which, by the hypothesis, they are to be stripped.²⁰

Maine believed then, that in its most systematic form, Natural Law theory was widely accepted as a historical account of society. But he also recognised that it was not held exclusively as such. In its non-historical interpretation the spectre of nature impeded the reception of the historical method. The following quotation is but one of many to the same effect.

But though the philosophy founded on the hypothesis of a state of nature has fallen low in general esteem, in so far as it is looked upon under its coarser and more palpable aspects, it does not follow that in its

subtler disguises it has lost plausibility, popularity, or power. I believe, as I have said, that it is still the great antagonist of the Historical Method; and whenever (religious objections apart) any mind is seen to resist or condemn that mode of investigation, it will generally be found under the influence of a prejudice or vicious bias traceable to conscious or unconscious reliance on a non-his-
toric, natural, condition of society or the individual.²¹

Underlying this disposition, Maine recognised the philosophical assumption of the State of Nature. His major historical criticism of the theory was completely ineffective against this particular interpretation. The presentation of empirical evidence could never refute philosophical understanding. The only manner in which the inconveniences in this sphere could be removed was by demonstrating, not the theory's invalidity, but its inappropriateness - its irrelevance in the face of new empirical data. In effect, Maine was making the same distinction made by Willey that ". . . a belief can be metaphysically 'true' (in the sense of 'coherent' or 'consistent') and yet be empirically false, that is, not in correspondence with what we call a 'state of affairs'."²²

Once its 'empirical falsity' had been shown and the true 'state of affairs' regarding the evolution of society had been made manifest, then even the tacit acceptance of the philosophical account of the emergence of society would be untenable. It would be subjected to the same contempt with which Maine dismissed the Natural Law discussion of the modern will, when he said:

Nobody, I imagine, would affect to maintain such a doctrine, when once it was ascertained that all these characteristics had their origins within historical memory. . . .²³

Maine's attack upon Natural Law whether accepted as a philosophical or historical theory can be seen as perfectly justifiable. He dismissed its historical pretensions with historical data, and its philosophical account of society simply by demonstrating that it did not accord with the accepted evidence - its logical truth remained unimpaired, but as a meaningful explanation, it was irrelevant.

This long and protracted analysis of Natural Law must be seen in relation to the prevailing atmosphere of the 19th century. It has been shown that Maine's historical analysis of society was compatible with the rationalism of the Austin-Bentham school. But the mechanical account of the functioning of man's social institutions was felt by many to be inadequate and, indeed, incomplete. The scientific heritage of Newton, although still a powerful force, had provided a new rival, or perhaps more correctly, had been extended to its logical limits and given the appearance of being a new kind of explanation. The emphasis of inquiry was still scientific, but the positivist methods of the scientists had been introduced into a new area of investigation. The new orientation, best represented perhaps by Charles Darwin, was towards an evolutionary analysis. As we have seen, there was no necessary conflict between these two positions, nevertheless, in many cases, the more comprehensive later standpoint tended to lie

uneasily with the old. A new kind of truth was demanded or, at least, a more meaningful presentation of the old explanations. In addition to understanding how things worked, the important question was: why were they of the particular form they exhibited? The answer expected was not to be in the language or terminology of the ultimate question of Being: this age of materialism was not seeking the metaphysical assurances of the Scholastic tradition; the solution demanded was in terms of a scientific history, the presentation of empirical truth.

The main concern of Ancient Law was to provide such an empirical description of the growth of modern civilisation. The Historical Method was offered as a new and satisfactory mode of social investigation. But, as it has been shown, Maine believed that the theory of Natural Law remained an obstacle to this particular method: hence, his sustained attack. But as the theory of Natural Law had performed two functions in the history of ideas, the provision of a meaningful account of society and the foundation of a certain kind of political activity, Maine found it necessary to fill the vacuum he had created with two explanations of his own.

MAINE'S HISTORICAL METHOD

The new account of society will be dealt with first since this was Maine's primary objective in Ancient Law. The actual substance contained

in the explanation may best be retained for consideration in detail in the following chapter. At this juncture, it will be sufficient to consider some of the ideas surrounding the Historical Method. To attempt to understand society as the realization of a particular principle, such as 'nature' or 'utility', was of little value in accounting for all the anomalies which modern communities exhibited. Only one mode of appreciation could give sufficient reasons for all the peculiarities of a system - and that was by the Historical Method. Maine's comment on the Roman classification of property into 'Res Mancipi' and 'Res Nec Mancipi' is indicative of his position in relation to non-historical explanations of society. He said:

The lawyers of all systems have spared no pains in striving to refer these classifications to some intelligible principle; but the reasons of the severance must ever be vainly sought for in the philosophy of law: they belong not to its philosophy but to its history.²⁴

This failure to utilise the Historical Method is sufficient in itself to explain the inadequacies of contemporary jurisprudence. Not to take account of the character of law, as it made its first appearance, was a mistake ". . . analogous to the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients."²⁵ Certainly Maine saw no reason why such

a 'scientific solecism' should be tolerated in jurisprudence any more than in the other areas of thought. A knowledge of history was, in fact, particularly useful for an understanding of jurisprudence, since the early nature of jural conceptions contained, potentially, all the forms in which law subsequently established itself. This was made particularly clear in Maine's address to the University of Calcutta, when he assessed the impact of scientific method in the study of history.

In regard to the influence of the new methods on History, the only observation I will make is that their effect has been to change, so to speak, its perspective. Many portions of it which had but small apparent value are exalted into high esteem, just as a stone may be of greater interest to a geologist than a mountain, a weed than a flower to a botanist, a fibre than a whole organism to a physiologist, because they place beyond question a natural law or illustrate it with extraordinary clearness. One unquestionable effect of the tendency to regard history as a science of observation is to add greatly to the value of ancient, as compared with modern history, and not only to that of the wonderfully precise history of Greece and Rome, but to that of the semi-poetical history of ancient India. Ancient history has for scientific purposes the great advantage over modern, that it is incomparably simpler - simpler because younger. The actions of men, their motives and the movement of society are all infinitely less complex than in the modern world, and better fitted, therefore, to serve as materials for a first generalisation.²⁶

Maine's investigations were then, of an Aristotelian character. But, although he makes continual reference to the importance of primitive concepts in relation to modern thought, he cannot be accused of thinking

that the motives which generated certain practices and ideas necessarily have a close connection with those which sustain them in the present.

. . . the warning can never be too often repeated, that the grand source of mistake in questions of jurisprudence is the impression that those reasons which actuate us at the present moment, in the maintenance of an existing institution have necessarily anything in common with the sentiment in which the institution originated.²⁷

Maine's historical method of analysis was firmly rooted in 'empiricism'. Generalisations and laws of development must be provoked by the nature of the evidence alone. Too often, he felt history was approached with some notion independent of the historical material - such as, a theory of progress or evolution - which was then used to determine the selection of appropriate 'facts'. He, himself, made few dogmatic assertions regarding laws of society; there could be no self-confident assertions about inevitability in the historicist manner. Instead he was content to observe and classify. In this way, developmental laws could be discerned but they tended to be of a very low level of generalisation, for example, his thesis of the growth of early law from judgements to codification and his famous generalisation regarding the movement of society from status to contract. But, as for theories of the inevitability of progress, Maine saw no evidence to support such claims. Rather, he saw progress as something of an enigma; the normal condition of mankind being one of abject stationariness. It is thus with a careful, detailed scrutiny of the historical material that Maine suggests an understanding of the present world may be achieved.

MAINE'S POLITICAL IMPLICATIONS

The approach to political activity may now be outlined. Although Maine does not develop the political implication of his argument to the full in Ancient Law, there is a great deal of evidence to suggest that the themes taken up in Popular Government had already occurred to him. Despite the suggestion of some writers that there is a significant break in continuity between Ancient Law and Popular Government: that one exhibits a confident liberal thesis; the other, a frightened reactionary theme, the two books may be seen as forming a coherent whole. In effect, they are both responses to the breakdown in the theory of Natural Law. The political ideas expressed in Ancient Law, therefore, must be examined if the full ramifications of his criticism of social theories based on 'nature' are to be traced. For the most part, however, the views expounded simply reflect the hostile criticism of modern rationalism, and in particular of Natural Law, which have been noted above, and fail to develop his own position in regard to the nature of political activity.

To fully appreciate Maine's fears in respect of political change, it is important to recognise the great role played by ideas in the history of mankind. He believed that there was a close interplay of cause and effect between society and ideas and vice versa.

Whilst 'ideas' were certainly the product of historical circumstances, being generated by the demands met by a progressive society, they could have either a beneficial or disastrous influence on civilisation. The early influence of the Law of Nature had certainly been favourable - it could almost be claimed as the main impetus of all progressive societies. By keeping the ideal of 'simplicity and harmony' before the minds of the jurists, it enabled society to escape from the trammels of ancient law and proceed along the path of progress. Such is the importance Maine attached to Natural Law that he said, ". . . it is not easy to say what turn the history of thought, and therefore, of the human race, would have taken, if the belief in a law natural had not become universal in the ancient world."²⁸ References to this relationship between thought and action are very numerous. For example, in discussing Roman Equity (which was the Roman instrument for realizing the ordinances of nature), he claimed: ". . . It is the root of several conceptions which have exercised profound influence on human thought, and through human thought have seriously affected the destinies of mankind."²⁹ One of these conceptions was certainly the recognition of the individual. In fact, Maine claimed that the greatest function of Natural Law was ". . . in enfranchising the individual from the authority of archaic society."³⁰

In a similar vein, he stressed the vital role which the 'fiction' of consanguinity played in fostering the growth of family groups into cohesive societies. "The conclusion then which is suggested by the evidence is, not that all early societies were formed by descent from the same ancestor, but that all of them which had any permanance or solidity either were so descended or assumed* that they were."³¹ And as a final example, in discussing Roman conveyance, Maine suggested that it was a proceeding to which ". . . we may unhesitatingly assign the parentage of two great institutions without which modern society can scarcely be supposed capable of holding together, the Contract and the Will"³²

But besides this favourable influence in releasing the progress of society, ideas could also prevent all but limited change: such an occurrence, as noted in the discussion of the codes, had happened in Hindoo society. Superstition and religious dogmas had prevented the gradual amelioration of the legal system. Certain changes had been made, but there had been no experience of progress. This Maine believed, was the condition of all but a few societies - stationary and unchanging.

It was with reference to this dangerous aspect of thought that Maine was concerned with the modern interpretation of Natural Law. He felt that the danger stemmed from the moderns losing the key to the ori-

* my italics

ginal Roman appreciation of the concept. The Roman jurists, it has been suggested, had attempted to realize their ideals by rectifying the anomalies in existing institutions and practices. Rousseau and his disciples determined their activities by the exclusive contemplation of an ideal, non-historic state of nature.

The danger with Rousseau's interpretation lay in his attitude towards change. By ignoring the realities of existing conditions - for Maine the essential roots of a meaningful approach to reform - there was a clear tendency for prescriptive state of nature theories to become the source of revolutionary thought. The traditional values and beliefs of society were threatened by the pursuit of an ideological utopia and the consequences of their downfall, Maine saw as including a return to a condition of savage barbarity.

Maine knew that in the higher intellectual circles the whole idea of the State of Nature had been recognised for its true worth and that speculation was now not about the validity of the theory, but about how such an error could have had such a pervasive influence. But its force was not yet spent: its retention by looser thinkers continued to impede the acceptance of the Historical Method. In conjunction with certain social and political tendencies, it continued to be a powerful force in popular political movements. It was at this lower intellectual level that such ideas, by becoming part of the general body of thought could

exert a most subversive influence. The impact of ideas had rarely been direct. Rather, hints and impressions, infused into the mental atmosphere of an age, were the determining factors of civilisation. They shaped the very framework of the articulate mind. Exhibiting a sociological view of law, Maine believed that the well-being of a normal, progressive society depended upon the rapidity with which the gap between its mental progress and social organisation was closed. But in a society corrupted by the theories of Rousseau, the attempts to realize these ideas could jeopardize the whole future progress of that society by destroying the existing social fabric.

Fears regarding the dangers inherent in the rationalist approach to politics, and contempt for their explanation of society, thus provide the context within which the more detailed analysis of Maine's own position can be developed.

REFERENCES

JURISPRUDENCE

Chapter Two : References

<u>Page</u>	<u>Ref. No.</u>	<u>References</u>
59	1	<u>Ancient Law</u> ; Sir Henry Maine*; p. xv.
61	2	<u>ibid.</u> , p. 170.
61	3	<u>ibid.</u> , p. 214.
63	4	<u>ibid.</u> , p. 11.
64	5	<u>ibid.</u> , p. 14.
66	6	<u>ibid.</u> , p. 182.
67	7	<u>ibid.</u> , p. 4.
70	8	<u>ibid.</u> , p. 31.
71	9	<u>ibid.</u> , p. 46.
71	10	<u>ibid.</u> , p. 43.
71	11	<u>ibid.</u> , p. 43.
73	12	<u>ibid.</u> , p. 45.
74	13	<u>ibid.</u> , p. 68.
75	14	<u>ibid.</u> , p. 52.
75	15	<u>ibid.</u> , p. 57.

* NOTE: All references to Ancient Law are to the Everyman edition.

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<u>page</u>	<u>ref. no.</u>	<u>references</u>
76	16	<u>Popular Government</u> ; Sir Henry Maine; p. 155.
77	17	<u>Ancient Law</u> ; p. 182.
78	18	<u>ibid.</u> , p. 181.
79	19	see <u>Political Thought in England 1848-1914</u> ; Sir Ernest Barker; chapter VI.
79	20	<u>Ancient Law</u> ; p. 149.
80	21	<u>ibid.</u> , p. 53.
80	22	<u>Seventeenth Century Background</u> ; B. Willey; p. 18.
81	23	<u>Ancient Law</u> ; p. 103.
83	24	<u>ibid.</u> , p. 161.
83	25	<u>ibid.</u> , p. 70.
84	26	<u>Village Communities</u> ; Sir Henry Maine; p. 268.
85	27	<u>Ancient Law</u> ; p. 111.
87	28	<u>ibid.</u> , p. 44.
87	29	<u>ibid.</u> , p. 27.
87	30	<u>ibid.</u> , p. 152.
88	31	<u>ibid.</u> , p. 77.
88	32	<u>ibid.</u> , p. 120.

CHAPTER THREE

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THE PATRIARCHAL THEORY

THE DIRECTION OF MAINE'S INVESTIGATIONS

In the first five chapters of Ancient Law, Maine prepared the ground for the reception of a new approach to the study of society. The rest of the work was concerned with an examination of early Roman law in relation to this. He was to employ this method of analysis in each of his other legal treatises, trimming and expanding the ideas suggested in his original work by reference to other systems of primitive law. To construct an adequate framework for understanding his conception of early law and society, therefore, it is necessary to take into account the whole system of his legal thought.

Maine claimed that the historical analysis of law revealed certain epochs which marked the beginning of distinct trains of legal ideas and distinct courses of practice. Such periods often introduced new and modified ideas which subsequently became of great importance. He suggested the following as major examples of this kind of occurrence: the adoption of Natural Law in Roman legal theory; the influence enjoyed by Canon Law in the mediaeval world; and the formation of the feudal structure of society. Each of these offered a new understanding of law

based on principles quite independent of the established ones. Although no single idea has come to permeate every aspect of the modern structure of law, some have proved dominant in specific branches. To comprehend the contemporary complex of law completely, it is then necessary to trace the growth of law from its origin, noting its various transmutations under the impact of new ideas. The original source of all legal ideas, Maine believed, was the patriarchal family, and it was with this institution that he commenced his analysis.

THE NATURE OF THE PATRIARCHAL THEORY.

Recognition of the evidence for the early existence of the patriarchal family, Maine was anxious to stress, was not new but had a very old and respected lineage. Its first expression had been given in the laws and history of the ancient Hebrews. Evidence also existed in the writings of classical Greece: both Plato and Aristotle, in writing of contemporary barbaric societies, had provided valuable information of the patriarchal structure. Also, if the Homeric myths of cyclopean families are taken as representations of non-Greek societies, as Maine suggested they might, then here too was further corroborative evidence.

With the gradual breakdown of family orientated association in the progressive civilisations, the patriarchal understanding of society fell into desuetude and was replaced by natural law explanations. The

theory was retained only in religious teachings where it remained an integral part of the doctrine. Its association with religion, however, did little to secure its widespread acceptance. It was eschewed in the sceptical atmosphere of the 18th century, being considered in serious academic circles as little more than a theological myth, and on a more popular level, because of its Semitic origins. The patriarchal theory, then, was abandoned by the 19th century. Yet Maine found that it alone provided the key to a scientific understanding of early law, his investigations showing significant evidence supporting this essentially scriptural thesis. Indeed, by using the accounts of contemporary observers, primitive records, and the ancient laws of societies belonging exclusively to the Indo-European stock, he amassed such a quantity of favourable material that it was difficult to lay down that any particular society had not, at one time, been organised on the pattern of a patriarchal community.

Before examining the Patriarchal Theory, the logical status it enjoyed must first be determined. In approaching his object of relating the earliest ideas of mankind to their modern equivalents, Maine found himself confronted by the barriers to an historical understanding which the natural law theories presented. His first task in Ancient Law had been to expose the inadequacies of such explanations, substituting in their place the claims of the Patriarchal Theory. This, he suggested, in contrast to

the other accounts, might be considered "a real historical theory that is a theory giving an account upon rational evidence of primitive or very ancient social order".¹ Maine recognised that all theories regarding the original formation of civil society were to a degree conjectural in that they went beyond the evidence. But the patriarchal exposition most closely accorded with the apparent facts, although no actual working system of patriarchalism was known. Whilst admitting that he could not hope to gain results which "in point of interest or trustworthiness, are to be placed on a level with those which for example have been accomplished in Comparative Philology,"² he claimed that in its own way the evidence for believing all early society to be patriarchal in character was ". . . very much of the same kind"* and strength as that which convinces the comparative philologist that a number of words in different Aryan languages had a common ancestral mother tongue."³ In essence then, the Patriarchal Theory may be regarded as a historical means of providing a framework within which a social system of a particular type could be described and comprehended.

Confident that the Historical Method had proved fruitful in the analysis of early Roman Law, Maine extended his enquiries to other sources of the Indo-European culture. This led to an intensive examination of the Brehon Laws of Ireland and the Hindoo Codes, but also with some reference to Greek, Russian, Teutonic and Slavonian sources. He developed a system

* my italics

of cross reference, enabling points only suggested in one system to be clarified by reference to explicit characteristics of a society at a different period of growth. For example, the mystery surrounding the origin of the Roman concept of Equity, which was to play such a vital role in shaping civilisation, was resolved by comparison with the development of Hindoo Law in this field. Maine considered that comparison revealed the emergence of Equity as the means of determining the questions of inheritance upon the dissolutions of the practice of ancestor worship which had formerly regulated the devolution.

More than this, however, because of the survival in India of a relatively primitive society, Maine believed that the historical and comparative methods of analysis could actually be compounded. He said:

. . . 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 man those great and unexplored regions which we vaguely term the East, we find it to be not 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.⁴

Recognition of this fact brought the manifold advantage of actual observation to the study of man's early social life. Factors which had never been recorded, although exerting a great influence upon the character of society, could be gleaned from contemporary 'survivals' and used to aid

the historical analysis of various cultures. This was by no means reading the present into the past, but simply using observation to indicate fruitful areas of inquiry in purely historical investigations.

Throughout these studies, the Patriarchal Theory proved invaluable as a tool of analysis; for the various societies of the Aryan race seemed to exhibit a common patriarchal structure. But Maine's object in these studies must not be misconstrued; he was not simply postulating a hypothesis and then seeking to test his theory. To suggest, as J.H. Morgan does in his introduction to Ancient Law, that an attempt to substantiate the Patriarchal Theory was "the central feature of Maine's speculations" and that even "the topics of the other chapters are largely selected with a view to supplying confirmation of the theory"⁵, is quite misleading. Not only does this conflict with Maine's professed intent, but since the chapters on Contract, Delict and Crime have little concern with supporting that theory, there seems to be no apparent reason for Maine to have dealt with them. Morgan himself recognised this deficiency in his interpretation, when he confessed that "the chapter on Contract, although it contains some of Maine's most suggestive writing, and the chapter on Delict and Crime, have a less direct bearing on the main thesis. . ."⁶ Contrary to Morgan's position that the chapter topics were determined by the need to verify the Patriarchal Theory, it would seem highly likely that they would have been just the same without this programme. If Maine was to determine the nature of primitive

concepts of law, then, quite obviously, he had to examine each of the major branches of law in turn, and this alone accounts for the form which his book displays. But this is not to suggest that the Patriarchal Theory did not provide Maine with his basic framework of analysis. Perhaps an analogy regarding the nature of ploughing will clarify this important point. The object of ploughing is to prepare the earth for cultivation, it is not an attempt, in normal circumstances, to demonstrate the quality of the plough itself. But, clearly, the fact that the object is not to 'prove' the plough in no way detracts from its importance, provided it performs its function adequately. If it does the job well, then one might conclude that it is a good plough; but this would be determined solely by its utility in securing ones real purpose. So with the Patriarchal Theory, it was fundamental to Maine's task of relating primitive and modern ideas. Because it was able to so explain phenomena, it was in a way confirmed, but this was almost coincidental to Maine's major purpose.

THE ORIGIN, CHARACTER AND EVOLUTION OF SOCIETY

A full understanding of the Patriarchal Theory may best be secured by discussing it within three broad categories: firstly, as an account of the origin of civil society; secondly, as an explanation of the character of primitive or very ancient social order; and thirdly, as an illumination of the process of gradual dissolution which some primitive societies have undergone.

In Ancient Law Maine was primarily concerned with the second function of the Patriarchal Theory, namely, as an instrument for understanding the early institutions of man in society. As he said in Early Law and Custom, "It was not part of my object to determine the absolute origin of society."⁷ But, he did suggest that the evidence seemed to show that the most rational account of the origin of society was to assume that the family, instead of fragmenting when the children became old enough to form separate groups of their own, which is the practice in the modern world, held together and expanded into a larger kinship association. To which he added:

. . .if we consider the weight of the argument and evidence to be in favour of the commencement of human society in Patriarchal (or Cyclopean) families, we shall think it not incredible but highly probable that certain communities which have survived to historical times have grown without interruption out of their original condition. "In most of the Greek states and in Rome," I wrote in Ancient Law (128), "there long remained the vestiges of an ascending series of groups out of which the State was at first constituted. The Family, House, and Tribe of the Romans may be taken as the type of them, and they are so described to us that we can scarcely help conceiving them as a series of concentric circles which have expanded from the same point. The elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregation of Families forms the Gens or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the Commonwealth."⁸

Although Maine felt that kinship could, in this way, be seen as the prime mover in the formation of society, he recognised that in Ancient

Law the theory had been left incomplete. Indeed, it was the fundamental question which remained unanswered, the question as to ". . . what were the motives which originally prompted men to hold together in the family union?" But to such a question Maine believed "Jurisprudence, unassisted by other sciences, is not competent to give a reply."⁹ Clearly this left the thesis in a somewhat unsatisfactory position. But in a later work (Early Law and Custom), Maine was able to realize his anticipation of help from the other sciences. To resolve the problem, he called upon the support of "the greatest name in the science of our day" namely that of Charles Darwin. His investigations, Maine observed, had led him to adopt a view of early man indistinguishable from the patriarchal model. Not only did Darwin suggest that promiscuous intercourse, in a state of nature was "extremely improbable" and ". . . that primeval men aboriginally lived in small communities, each with as many wives as he could support or obtain,"¹⁰ but he added that certain psychological drives could account for the cohesion of the family unit. The major instincts involved were those common to the higher animals: sexual jealousy, and the basic expression of paternal care. Similar conclusions had been achieved by continental enquirers into early society, particularly Letourneau and Le Bon, both of whom had the advantage of biological training. Consequently, Maine felt a certain justification in claiming that ". . . sexual jealousy indulged through power might serve as a definition of the Patriarchal Family."¹¹ These psychological forces

then, are at the foundation of man's entry into civil society; but, once the association had gained any recognition, they were reinforced by law, custom and religion, particularly that of ancestor-worship.

Nevertheless, the Patriarchal Theory held no monopoly in accounting for the origin of civil society. Ever since its restatement by Maine in 1861, it had been subjected to heavy criticism by two other pioneer anthropologists Morgan and McLennan. These two writers offered theories, albeit conflicting ones, based on the matriarchal model. These explanations had been prompted by the study of contemporary savage communities in North America and Australia. Their accounts of the formulation of society completely revised the picture presented by Maine. They believed that originally primitive man had been associated in unorganised promiscuous hordes, from which, after a series of developmental stages, the patriarchal family emerged. This clash between the two systems, regarding the formation of society, was fundamental and had repercussions on the appreciation of early society itself.

To refute the applicability of Maine's thesis, Morgan and McLennan produced material for which the Patriarchal Theory failed to account. There certainly was some archeological evidence and patterns of social organisation among primitive man, regarding which Maine suggested it would be gratuitous to assume that they had ever experienced a period of patriarchal organisation. But this did not mean that he was

prepared to relinquish his theory in favour of those of his rivals, he was simply recognising its limitations. In actual fact, the conflict between the patriarchal and its rival thesis was, to some degree, unreal. Maine, at least, had limited his explanation to a particular group, the Indo-European civilisation, whilst Morgan and McLennan were making overconfident generalisations from totally different races. The conflict, then, resulted from the false position in which the matriarchal theorists had placed themselves. As Maine said:

. . . while the Patriarchal Theory and the counter-theory of which I have been speaking each explain reasonably well a certain number of ancient social phenomena, both are open to considerable objection as universal theories of the genesis of society.¹²

Now in attempting to demonstrate the respective merits and demerits of the patriarchal and matriarchal theories, Maine drew together all the significant points of discussion, providing important insights into his understanding of the cohesive factors in the family structure. The first point which he stressed was that the patriarchal family was based on the concept of power - the notion of the strong man. Indeed, strength alone, obviously an important factor in savage society, was recognised as the foundation of kinship relations. Adopted members, sometimes not even of the same race or religion, were absorbed into the family as blood relations, and became totally indistinguishable from true kin, sharing all their privileges and responsibilities, even the assumption of a common

ancestor. Maine was able to illustrate this procedure from his experiences in India where kinship was still formed by merely subjecting oneself to the head of a family.

Maine's second claim was that the Patriarchal Theory, as we have seen, recognised the importance of sexual jealousy as a cohesive element in family relations. This, together with the third factor of the paternal instinct, not only suggested that the family structure would be more likely to emerge than that of the horde, but also determined that it would probably take the rigid, complex patriarchal structure, rather than its looser modern form.

He believed that these three forces, so fundamental to man's nature, although completely neglected in the work of Morgan and McLennan, were able to account for more than the origin of society. They also explained why those communities, which had lapsed under abnormal circumstances from the patriarchal system, were able to recover their original structure.

Refusing to become embroiled in the great controversy between Morgan and McLennan regarding the various stages through which society had passed when moving from a matriarchal to a patriarchal structure, Maine cautiously observed that:

. . . there is nothing in the recorded history of society to justify the belief that, during that vast chapter of its growth which is wholly unwritten, the same transformations of social constitution succeeded one another everywhere, uniformly if not simultaneously. A strong force lying deep in human nature and

never at rest, might no doubt in the long run produce an uniform result, in spite of the vast varieties of of circumstance accompanying the stern struggle for existence, but it is in the highest degree incredible that the action of this force would be uniform from beginning to end.¹³

Not only does this indicate why Maine refused to take issue with his opponents on this point, it throws light upon the character of his own argument. It emphasizes that he regarded consonance with the evidence to be of prime importance in making generalisations; and that within a movement, achievement of identical goals did not necessarily mean identical evolution. As he was to show, the role of imitation was of some moment in this context. Maine concluded, then, that whilst not purporting to give an account of all societies, the Patriarchal Theory offered a more coherent explanation of Indo-European evidence regarding the formation of society than did the later matriarchal expositions.

But although the function of explaining how society must have been formed was of great significance, since it influenced the structure of early civilisation, Maine's principal concern was to concentrate almost exclusively on comprehending the nature of early communities themselves. Here, the realm of conjecture had been left behind, and evidence abounded for making generalisations regarding the 'history of the institutions of civilised men'.

The larger political units of the tribe and the nation were originally extensions of the patriarchal family. When a specific geo-

graphic area was permanently settled, however, the kinship basis of association tended to be replaced by the concept of 'territorial sovereignty'. This was the idea that membership of society was determined by man's relationship to a particular land and its institutions rather than to its inhabitants. But even so, the patriarchal family, and the larger aggregation, the village community, retained their identity and importance in society. He illustrated the movement using the terms of an ancient Indian poetess in the following way:

The poetess - for the lines are attributed to a woman - compares the invasion to the flowing of the juice of the sugar-cane over a flat surface. ('Mirasi Papers', p. 233) The juice crystallises, and the crystals are the various village communities.¹⁴

Thus, whether in its fully developed form of the kinship tribe, or even at the later stage of a society based on land ownership, the family unit provided the foundation of social activity in all its aspects.

Describing the patriarchal family, Maine wrote:

The eldest male parent - the eldest ascendant is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of the family himself. The flocks and herds of the children are the flocks and herds of the father, and the possessions of the parent, which he holds in a representative rather than a proprietary character, are equally divided at his death among his descendants in the first

degree, the eldest son sometimes receiving a double share under the name of birthright, but more generally endowed with no hereditary advantage beyond an honorary precedence.¹⁵

In this tightly drawn, despotic, family unit, the individual, the foundation of modern society, was unknown. Each person possessed his identity as part of the family group. Recognising this fact, Maine stressed that: "We must be prepared to find in ancient law all the consequences of this difference."¹⁶

On a general plane, the structure of early law could easily be accounted for on the patriarchal model. The main function of law was seen as regulating the relations among the various family groups in society. This explains two points. In the first place, why certain areas of primitive law are so poorly covered, for example, the Law of Persons. The subjects dealt with in this branch of law were treated as purely family matters and consequently the sole concern of the jurisdiction of the eldest male ascendant. Public law had no place within this domain. In the second place, it accounts for the great detail and complexity of such areas of law which were dealt with in early legal practices since, in effect, law was organising the relationships of sovereign communities. Just as with modern International Law, primitive law recognised the sanctity of the internal affairs of its constituent legal units, whilst providing all the ceremony and niceties required in transactions between such sovereign bodies.

The patriarchal structure of society, then, determined the character of almost all the branches of early law. Because Maine had secured this key to legal understanding, his account opened the door to an interpretation radically different from those thinkers who had conceived primitive law in terms of the individual. Clearly, it would be inappropriate and unrewarding simply to reiterate all the ramifications of Maine's discoveries, but the major points must be noted.

Perhaps one of the most significant features of patriarchal society was the nature of property ownership. Property was not held severally, but in common by the whole family. This primitive communism extended not only to landed property, which was both cultivated and enjoyed communally; but also to the particular contributions of individual members of the family, special skills, gratuitous discoveries and plunder. All were shared, there was no idea of exclusive individual possession. Even the patriarch's ownership of the family wealth was of a representative rather than a personal form.

This communal ownership of possessions placed obstacles in the path of property transference; hence, the almost complete absence of a law of conveyance or contract. Transactions were difficult and highly complicated, not merely because they involved complex structures like sovereign states, but because the wishes of all the co-owners had to be respected. In some instances, certain portions of the family property

were completely inalienable in that they formed part of the essential assets of that community and its descendants.

The absence of testamentary succession from ancient law was also a result of communal ownership. As property belonged to the family, which could be considered as far as the law was involved as a metaphysical entity, the death of one of the members, even the patriarch, was of no consequence to the legal position of the property. Maine suggested, in effect, that the family bore the same relation to its members as did a company to its directors, and just in the same way that the death of the company chairman had no repercussions upon the assets held by the corporation, neither did the death of the patriarch have any legal significance. In both cases, a new head was selected who assumed all the responsibilities of that position and was legally indistinguishable from its former occupant. It followed from the fact that the 'family' owned the property, that no concept of determining the distribution of possessions after death could be conceived, since no physical person owned any wealth.

It has already been remarked upon that originally, the remaining major branch of civil law, the Law of Persons, was ill-defined. It eventually emerged with the disintegration of the patriarchal structure, but not without the features as to its origin remaining with it. Maine was of the opinion that ". . .the Family, as held together by the Patria Potestas, is the nidus out of which the entire Law of Persons has germinated."¹⁷

Public law simply assumed the functions which had in the past been performed by the patriarch.

The major branches of law have now been correlated with the patriarchal structure of society, but Maine's own summary of the connexion is worthy of note.

It should be recollected that the comparative barrenness of civil law in archaic collections is consistent with those other characteristics of ancient jurisprudence which have been discussed in this treatise. Nine-tenths of the civil part of the law practiced by civilised societies are made up of the Law of Persons, of the Law of Property and of Inheritance, and of the Law of Contract. But it is plain that all these provinces of jurisprudence must shrink within narrower boundaries, the nearer we make our approaches to the infancy of social brotherhood. The Law of Persons, which is nothing else than the Law of Status, will be restricted to the scantiest limits as long as forms of status are merged in common subjection to Paternal Power, as long as the Wife has no rights against her Husband, the son none against his Father, and the infant Ward none against the Agnates who are his Guardians. Similarly, the rules relating to Property and Succession can never be plentiful, so long as land and goods devolve within the family, and, if distributed at all, are distributed inside its circle. But the greatest gap in ancient civil law will always be caused by the absence of Contract, which some archaic codes do not mention at all, while others significantly attest the immaturity of the moral notions on which Contracts depend by supplying its place with an elaborate jurisprudence of Oaths.¹⁸

The recognition of the patriarchal structure of early society was paramount to any coherent picture of man's earlier social condition, with its

various institutions, customs, laws, ideas and beliefs. And so, only by securing a complete representation of this early organisation could Maine perfect his historical understanding of law.

This brings us to the third aspect of Maine's study of the Patriarchal Theory, namely the gradual dissolution of the family in western society. This is usually regarded as his theory of social evolution. Perhaps the best way of appreciating the movement is to compare Maine's picture of primitive society with his understanding of the contemporary world; thus throwing the contrast into sharp relief, and enabling the connection between them to be given greater significance.

The chief characteristics of primitive society have already been outlined, and so it remains to describe those of the society which replaced it. Maine's most immediate impression of western progressive societies was that of their immense complexity. Specialization seemed to be the order of the day, producing, in the field of knowledge, not merely extensions of old branches of learning, but completely new spheres of investigation. In other words, Maine saw that the major feature of the modern world was progress: progress in the sense of the continuing production of new ideas, which could be absorbed into the permanent institutions of society, in particular into its legal structure. This process accounted for the complex

development of law, with its seemingly ever-increasing number of branches. At the centre of these changes, Maine saw the phenomenon of the individual. All aspects of the modern world were orientated towards him in the same way that primitive society had been structured around the basic unit of the family.

The apparent contrast, then, between the contemporary and the primitive conditions of man, with his lack of specialized knowledge and the patriarchal structure of his society, was very great. Consequently, the intermediary period during which the change from one to the other had occurred was of immense interest. Maine believed that the two conditions were connected by a rational process of development. As he said:

Our studies in the Law of Persons seemed to show us the Family **expanding** into the Agnatic group of kinsmen, then the Agnatic group dissolving into the separate households; lastly, the household supplanted by the individual. . .¹⁹

He further believed that:

. . . the old order changes, yielding place to the new, but the new does not wholly consist of positive additions to the old: much of it is merely the old very slightly modified, very slightly displaced, and very superficially combined. That we have received a great legacy of ideas and habits from the past, most of us are at least blindly conscious; but no portion of the influences acting on our nature has been less carefully observed, and they have never been examined from a scientific point of view.²⁰

The various factors involved in the breakdown of the ancient family structure must be examined in detail if they are to give some indication of why

the modern pattern of society emerged and superceded that of the primitive world.

In Hindoo society, it has been suggested, ancestor-worship arrested their movement towards a modern type of social life. Originally, the obsequies to the deceased patriarch had to be performed by the eldest surviving male. The new head of the family, it was believed, had special links with the family ancestors; and consequently, great lengths were taken to ensure that there would be a male heir to perform the family rites. These rites were fundamental to the survival of the old order. The great change in the role of ancestor-worship was the result of the intervention of the religious caste of the Brahmins. They frowned upon many of the means used to secure male issue and so they encouraged the principle of allowing coagnate relatives to perform the family rituals. A certain degree of self-interest can be seen in the Brahmins' policy as it produced a breakdown in the organisation of joint families. Since various religious ceremonies had to be performed in every household, the income of the Brahmins rose proportionally with the proliferation of separate family units. But the important point is that by allowing coagnates to succeed, the Brahmins had taken ancestor-worship and transformed it from an instrument of social stability to one of change. Various other factors, however, prevented Hindoo society from moving very far in this direction.

In Roman society, the real departure from traditional family relationships was not the result of religious doctrine, nor of a capricious use of the rights of testation: it followed from the demands of war. The separation of parts of the family over long periods of time seriously weakened the patriarchal ties. This was further encouraged by the Roman Emperor securing the rewards of war to the soldiers themselves rather than compelling them to contribute it to the general wealth of the family. It was thus one of the side effects of imperial aspirations which led to the transformation of Roman civilisation. The fortunes of war initiated a new period in which the old forms and institutions were replaced by the new.

Once the process of family breakdown had begun, however, it gathered momentum, not simply from its own impetus, but from extraneous forces. The most important of which was the influence of Natural Law. As Maine said, its acceptance created a new epoch in the history of ideas. With the ideals of simplicity and harmony, the complex formulae, appropriate to the patriarchal system, were finally swept away, and the individual allowed to emerge.

These two factors, although not the original cause of social development, certainly accounted for its acceleration. The individual was continually concerned with breaking down the remaining ascriptive ties, and the lawyers with the pursuit of their goal of clarity. There

was a continual interplay between society and new ideas. Each stimulated the other, resulting in distinct movements towards a more sophisticated and specialized world. Referring to law in particular, Maine said:

It may here be observed that we know enough of ancient Roman law to give some idea of the mode of transformation followed by legal conceptions and legal phraseology in the infancy of jurisprudence. The change which they undergo appears to be a change from the general to the special; or, as we might otherwise express it, the ancient terms are subjected to a process of gradual specialisation.²¹

But this movement from the general to the particular was not confined either to Roman law or even Roman society. It was a process experienced by all 'progressive' civilisations. Characterising human relationships in the modern world as essentially contractual and those of the ancient as determined by status, Maine was able to arrive at his famous maxim regarding the development of society, that is "... the movement hitherto has been a movement from Status to Contract."²²

This form of social change was not, as we shall see, considered by Maine to be in any way a necessary condition of society. Indeed, he remarked on a number of occasions that 'progress', which was the usual appellation applied to this particular type of development, was something of an anomaly. In Ancient Law, for example, he noted:

It is only with the progressive [societies] that we are concerned, and nothing is more remarkable than their extreme fewness. . . It is indisputable

that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record.²³

Stationariness, or change within narrowly circumscribed limits, can thus be considered the normal condition of civilisation. But, and this is Maine's point, if a society ever escaped from the straight-jacket of paternalism, its development would proceed along the status to contract axis.

As there was only one path of social evolution, it was possible for a society to gain guidance from the experiences of fellow travellers. In this respect, Maine held Sir Alfred Lyall's discussion of the imitative process to be of great significance. By supplementing its own internal impetus towards improvement, with ideas drawn from more advanced cultures, it was possible for society to avoid any unnecessary detours in its process of development. But the employment of imitation, Maine believed, was not necessarily conscious. It occurred whenever 'modern' and 'primitive' civilisations came into contact. Witness the adoption of the English legal system in India: this was not an explicit feature of British policy. In attempting to administer native Indian law efficiently, English ideas were gradually assimilated, resulting in a total transformation of the traditional codes. Maine considered that the imitative faculty held vital consequences for social theory.

The important lesson is that in sociological investigation it is never possible to discover more than the

way in which the Type has been formed. If an institution is once successful, it extends itself through the imitative faculty, which is stronger in barbarous than in civilised man. It follows from this that no universal theory, attempting to account for all social forms by supposing an evolution from within, can possibly be true.²⁴

Within the evolution of modern civilisation then, there was scope for variation within the patterns of advancement. There were no necessary stages for each and all societies. The character of an epoch was determined by the particular circumstances in which a society found itself. These would be conditions created both by internal and external forces. The only categorical statement which Maine was prepared to make was that, like the stages of early law, the epochs in the movement from Status to Contract, although they might be omitted, could never be in a different order. The movement was always towards greater complexity.

The progress of society as a whole was intimately linked with the character of its citizens; upon them alone rested the question of greater development, stagnation, or the return to some kind of primitivism. Involvement in social change was required if the demands of new circumstances were to be accommodated. Progress had no 'der Gang der Sache selbst', it was solely the creation of man's modification of the institutions of society for what he conceived to be the better in the light of current requirements. Ever present in advanced communities, however, was the possibility that the knife edge upon which they rested could, were too great a weight allowed to

fall upon it, cut away the very foundations of civilisation. This danger Maine considered to be at its greatest in the most sophisticated societies. Here there were no precedents for guidance; progress resulted solely from the recognition of felt needs. The situation was aggravated by the temptation to substitute for the concrete exemplars of advanced society some a priori principle or model utopia. This could prove disastrous. The imitation of the modern by the primitive society was justified because of the unilinear character of progress. It was impossible, however, to predict the nature of future development. Progress for the pioneers of advanced civilisation must be confined solely to the technique of social introspection.

Maine, then, was able to present a new understanding of society by employing the patriarchal model in these three distinct though clearly related ways: firstly, as an explanation of the origin of society; secondly, as a description of the nature of early social organisation; and thirdly, as the framework within which the emergence of modern society could be traced. He was thus able to provide new and more acceptable solutions to the questions which his attack on Natural Law had revived.

REFERENCES

THE PATRIARCHAL THEORY

Chapter Three : References

<u>Page</u>	<u>Ref. No.</u>	<u>References</u>
96	1	<u>Early Law and Custom</u> ; Sir Henry Maine; p. 195.
96	2	<u>Village Communities</u> ; Sir Henry Maine; p. 8.
96	3	<u>Early Law and Custom</u> ; p. 194.
97	4	<u>Village Communities</u> ; p. vii.
98	5	<u>Ancient Law</u> ; Sir Henry Maine; p. vi.
98	6	<u>ibid.</u> , p. viii.
100	7	<u>Early Law and Custom</u> ; p. 192.
100	8	<u>ibid.</u> , p. 219.
101	9	<u>Ancient Law</u> ; p. 159.
101	10	<u>Early Law and Custom</u> ; p. 206.
101	11	<u>ibid.</u> , p. 209.
103	12	<u>ibid.</u> , p. 203.
105	13	<u>ibid.</u> , p. 218.
106	14	<u>Early History of Institutions</u> ; Sir Henry Maine; p. 71.
107	15	<u>Ancient Law</u> ; p. 73.
107	16	<u>ibid.</u> , p. 74.
109	17	<u>ibid.</u> , p. 89.

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110	18	<u>ibid.</u> , p. 216.
112	19	<u>ibid.</u> , p. 159.
112	20	<u>Village Communities</u> ; p. 231.
115	21	<u>Ancient Law</u> ; p. 186.
115	22	<u>ibid.</u> , p. 100.
116	23	<u>ibid.</u> , p. 13.
117	24	<u>Early Law and Custom</u> ; p. 285.

CHAPTER FOUR

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MAINE AND CONSERVATISM

THE CHARACTER OF CONSERVATISM

Maine's political thought has usually been placed in the orthodox conservative tradition deriving from Edmund Burke. This classification has recently been reaffirmed by two eminent American commentators on conservative thought, Professors Peter Viereck and Russell Kirk. Viereck, indeed, suggests that Maine did little more than organise Burke's ideas.

No consistent philosopher, Burke left the systematizing of his ideas to disciples of more talent, less genius, notably Sir Henry Maine. Maine's Popular Government, 1885, systematized the Burkean approach into a consistent philosophy, gave it a scholarly basis, and applied it to the post-Burkean problems of modern industrialism.¹

Without being quite as precise as Viereck, Kirk places Maine firmly in the centre stream of conservative thought, by including him in his work The Conservative Mind, which he said was ". . . an analysis of thinkers in the line of Burke."²

Kirk intended to keep within the tight confines of this field by refusing to deal with Arnold, Morley and Bryce; for, although they were disciples of Burke, they were not what he called "regular conservatives". Maine's place in the field was safely secured, however, by his "intensely conservative"³ book Popular Government.

Assuming on these authorities that Maine was a Burkean conservative, it is necessary that the character of this style of thought be identified. At the very outset, however, conservatism must be differentiated from a quite different style, but one with which it has often been confused, namely, the doctrine of reaction or counter revolution. A failure to draw this contrast clearly enough led Viereck to participate in unnecessary 'ducks and drakes' with political terminology. He recognised the vast difference between the constitutional, evolutionary thought of Burke and the authoritarian, counter-revolutionary theories of de Maistre and his followers. But instead of leaving them as two separate systems, conservative and reactionary, he brought them together under the single label of conservatism. To distinguish the two wings now encompassed by the general term, it was necessary to substitute for the former titles of conservative and reactionary, the words "Burkean" and "Ottantottist."⁴ This strange procedure would clearly have been justified had it enabled a clearer understanding of politics, but it has created

confusion where ordinary usage would have been perfectly straightforward. Furthermore, by calling all true conservatives "Burkeans", Viereck has used a label which rests uneasily upon many. Conservatism was not simply a series of 'grandiose compositions' inspired by Burke's fine collection of folk melodies, it also contained many tunes for which he had no musical ear.

The failure to understand the difference between the conservative and the reactionary, then, leads to confusion. But what the real difference is has yet to be stated explicitly: it lies in their respective attitudes to political change. The conservative notion of change, however, not only distinguishes him from the reactionary, but from men of every other political hue. It is one of the two basic characteristics of the conservative style.

Unlike the reactionary, the conservative has come to terms with inevitable change in society. Change is seen as the Aristotelian actualization of immanent potentiality. It is the idea of an unfolding, the realization of the intimated. There can be no arrest of such a process, and even less a return to a lost golden age in the real or imaginary past. It is not a particular form of social organization that the conservative wishes to retain, it is continuity within social development he seeks to preserve.

In normal circumstances attending the needs of society results in a very slow process of change, but in conditions of emergency, a

conservative may well seize the initiative and act quite radically to preserve the social fabric. This activity is quite in harmony with the notion that change is not introduced on principle, but in response to concrete situations. The ability to determine when to act is incommunicable, it can only be discerned by one intimately familiar with the tradition and customs of the community. This idea underscores the second conservative characteristic, namely, the defence of an aristocracy skilled in the art of ruling.

The essential requirement for governing society, even in normal circumstances, was not a scientific technique or plan, but political wisdom. Politics is an art, not a science, and those capable of participation form a remarkably small proportion of the population. To preserve the influence of the genuine politician in 19th century mass society, it was necessary to maintain the Parliamentary system of government, including the vitally important House of Lords.

The support of aristocracy is fundamental to conservatism. As Dr. Gertrude Himmelfarb has pointed out:

If there is any one point, one single empirical test, by which conservatism can be distinguished from liberalism, it is a respect for aristocracy and aristocratic institutions. Every tenet of liberalism repudiates the idea of a fixed aristocracy; every tenet of conservatism affirms it.⁵

Although this ignores the importance of the attitude towards political change, it does highlight the regard for an aristocratic group.

The form which this takes varies within the conservative tradition from the support of the existing power structure to recommending something like an aristocracy of the talents. It was an inclination to remove the actual exercise of sovereign power from the hands of the people to those in possession of political wisdom - men mindful of the human predicament and the limited utility of political action.

The concepts of Aristotelian change and support of aristocracy, two inextricably linked ideas, are thus the two salient features which characterise the patchwork of conservative thought. Conservatism is, however, as R.J. White suggests,

. . . less a political doctrine than a habit of mind, a mode of feeling, a way of living,

and that the force holding the whole structure together is,

. . . not so much a body of intellectually formulated principles as a number of instincts, and the governing instinct is the instinct of enjoyment.⁶

The importance of this instinct for the political aspect of conservatism is that it relegates politics to a secondary level of priorities.

Numerous examples of what has been called "natural conservatism" are capable of being given. All are distinguished by a distrust of the unknown for fear of losing one's own identity, and a decided preference for that to which one is accustomed and has worn into a comfortable fitting.

This disposition, as one might expect, is claimed as the foundation of orthodox political conservatism. As Lord Cecil said:

The Conservatism of the Conservative Party, modern Conservatism, as we may say, is of course largely recruited from and dependent on the natural conservatism that is found in almost every human mind.⁷

Although no rigid dogma has been formulated from these dispositions, conservative theory has remained remarkably consistent. Actual circumstances and the nature of their assailants have determined the form of the conservatives' defences, but underlying them has been a constant attitude, an adherence to articles of belief with a consistency rare in the history of political thought.

ORTHODOX CONSERVATISM

It will be remembered that the characteristic style of conservative thought has already been described as Aristotelian and aristocratic. This is true of conservatism, whether orthodox or sceptical. However, certain of the 'principles' now to be discussed may or may not be held by all conservatives; but the neglect of the concepts of hierarchy and continuity in change invalidates the use of the conservative label altogether. This must be borne in mind in the following analysis of orthodox conservatism.

That both Kirk and White begin their examination of Burkean principles with the concern for religion is not without significance.

For the orthodox conservative society is governed by a divine Providence 'forging an eternal chain of right and duty which links great and obscure, living and dead.'⁸ Man is seen primarily as a religious creature; politics, rather than being seen as an end sufficient in itself, is reduced merely to being a necessary means to a higher spiritual end. In this way, political and religious-moral problems become indistinguishable in essence. The theocratic implications of this thinking, however, are checked, not only by a certain scepticism towards the efficacy of political or economic solutions to man's predicament, but by a particular concept of morality. Morality was purely a condition of the soul, stemming from the moral free agency of the individual - a spiritual voluntarism. This idea rests on a belief in intrinsic value which can be contrasted with the extrinsic value defined by, say, J.S. Mill in his essay on Bentham. Here Mill opposes the classical conservative argument formulated by Coleridge, claiming that morality has more to do with the calculation of the consequences of an action than with the motive of the agent.

In effect the late 18th and 19th century conservative revived a Thomist concept of society. Government had a limited but valid function in society; man's real goal, however, lay in a higher cosmological design. The benefits which government could provide were to be enjoyed.

Choices in government policy, however, lay not between good and bad, but between the least pernicious of the selection of evil alternatives. Caution, not ambition, must be man's keynote. To seek to create the City of God in this world would be to endanger that Providential heritage of law and order which alone could make earthly existence tolerable. A priori programmes of reform not only usurped the function of the Church in the search for salvation, but by imposing rigid doctrines destroyed the possibility of individual morality. Government was thus but a small link in the 'Great Chain of Being', a mere fragment of a properly ordered universe.

The restriction of governmental competence to prevent the encroachment upon the moral free agency of the individual leads on to a second 'principle', the organic concept of society. Society is seen as something more than an aggregate of atomistic individuals, each merely a unit capable of experiencing pleasure and pain, whose only tie was subjection to a common sovereign. Society was greater than the mere summation of its parts; it was ". . . the product of a system of real relationships between individuals, classes, groups and interests."⁹ In such a society the function of government was limited to maintaining social cohesion. The main orthodox position, although certain tendencies in Burke's personality led him beyond these limits, was a nomocratic

standpoint. Providence was the proper instrument of change, statesmen had to perceive the real tendency of Providential social forces rather than to fabricate artificial systems.

This notion of perceiving the direction of divine forces in society suggests what might be considered as the third characteristic of conservatism, namely, the rejection of "will" as the legitimization of law. Burke considered that Prudence was the proper source of inspiration for applying the general principles of Natural Law.¹⁰ His was not a utilitarian idea, but the notion that the general principles of Natural Law must be in sympathy with the divinely inspired laws and customs of the Constitution. In the actual process of legislation, the conservative rarely makes explicit appeals to the Natural Law, but by appealing to custom and precedent he claims to be evoking the institutionalized authority of previous deductions from those divine principles, and the older the precedent, the greater the certainty of its divine character.

But, perhaps it is wrong to isolate the main points of Burkean conservatism. It is a 'wholeness' and can only be understood as such. "To put up Conservatism in a bottle with a label is like trying to liquify the atmosphere. . ."¹¹ It may be possible, but it loses all its true characteristics and "feel". Thus, the dry skeleton of orthodox conservative thought presented here, can only become meaningful if the intangible attitudes, dispositions and feelings are borne in mind. At the

same time, however, the orthodox conservatives' concern with Divine Providence, Christian morality and organic order clearly distinguishes him from his sceptic and pragmatic brother whose position is outlined below.

THE BACKGROUND OF MAINE'S POPULAR GOVERNMENT

The breadth and scope of Maine's work was, as Frederick Pollock said, encyclopaedic. He dealt with history, jurisprudence, anthropology, sociology and even economics. And whilst his professional activity, apart from a brief period in the Indian Administration, was primarily concerned with academic study, in his 'leisure' time Maine pursued his interest in politics. This resulted in a clandestine journalistic career with his submitting, at various periods, articles to a number of reviews. They included the "St. James Gazette", "The Saturday Review", and the "Quarterly Review". The four essays comprising Popular Government, Maine's only political treatise, sprang from this spare time preoccupation, their being published in the "Quarterly Review" between April 1883 and April 1885.

The importance of this information is that it helps to explain the limited objectives of Popular Government and its somewhat polemical nature. To feel, like Russell Kirk, disappointment that "Maine sometimes

seems more concerned with the particularities of democracy than with the roots of society,"¹² is to misconceive the nature of the work.* Since the essays were originally review articles, they were concerned with immediate issues, not with any attempt to restate fundamentals. It is equally unwise to build too much on this journalistic activity of Maine. To claim, as G.A. Feaver does, that such activities are symptomatic of Maine's political alienation, of his "undemocratic", "dogmatic authoritarianism"¹³ is to read too much into them.

Now although the general circumstances of 19th century politics have been outlined, to understand Popular Government it is necessary to examine the immediate circumstances of the early 1880's. A number of events at this time must have been rather alarming to a man of conservative temperament, not least of which was the activity of the new trade unions. G.D.H. Cole has said "The years from 1871 onwards were fuller of strikes than any period since the collapse of the Grand National Consolidated Trades Union of 1834."¹⁴

* Kirk, interpreting Maine as an orthodox Burkean, would probably have felt that Popular Government was a disappointment even if it had not been the collection of limited review articles that it was. This is because Maine did not derive his political ideas from the system of Burkean metaphysics that Kirk imagined.

No doubt the depression of 1879 aggravated the situation, but what perturbed Maine most was not economic dislocation, but the deeper 'political' implications of trade unionism. The unions stimulated the political aspirations of the masses, encouraged extra-parliamentary associations, and gave a lead to the organisation of working men. A number of such bodies had been established; the most dangerous of which, from Maine's point of view, had distinct socialist leanings. Amongst these organisations were the London Working Men's Association, founded in 1866; the Parliamentary Committee of the T.U.C., founded in 1869; and the Labour Representative League, founded in 1870. If such bodies were to exert a controlling influence, then, Maine foresaw, not only the destruction of the traditional pattern of British Government, but of the English way of life itself.

The period 1868-1885 was definitely one of transition in British politics, a change from an era of "laissez-faire politics" to one of "joint-stock politics" or, in Beer's terminology, a move from "individualism" towards "collectivism,"¹⁵ It saw the dawn of the illusion of mass participation in politics, and the twilight era of the individual and the aristocracy.

The organisation of the masses was not the only disruptive element on the Victorian political scene. As Maine saw, the forces of nationalism and imperialism contained the seeds of future

convulsion. Already the dangers of these movements had been demonstrated. The national aspirations of Ireland constituted a basic political problem, no less so, the expansionist policies of the European powers.

Radicalism was another force of a destructive character. It was true, however, that its extreme wing, Republicanism, had been virtually eliminated by the disapprobation into which it fell after the attempted assassination of Queen Victoria in 1871. But, in its less extreme but equally destructive form, it was infiltrating the Liberal Party, and in the figure of Joseph Chamberlain, had a representative at Cabinet level. Clearly, such a man with his political "rationalisms", his caucus system and welfarism was symptomatic of the threat to the traditional Constitution.

Even worse, socialism was not merely active in working men's associations, it had an influence upon Gladstone himself.¹⁶ The consequent move of the Liberal Party leadership towards greater social intervention resulted in a significant loss of support to the Conservatives. According to Kirk, Henry Maine was one of these dissenting Liberals. But this is a difficult point to establish as Maine always had sympathies with the Conservatives although he was never a party man.

In Maine's eyes, even the Conservative Party had in itself failed to withstand the 'evils' of the period. The Conservatives had not only been most active in respect of social legislation in the 19th century, but were becoming increasingly democratic in their party structure. The main stimulus for this came from a small ginger group known as the 'Fourth Party', established in the Conservative ranks in 1880. Despite the fact that it was based on radical principles, quite incompatible with the Conservative tenets, the party exercised considerable influence until its leader, Lord Randolph Churchill, fell from power in 1886.

Maine's fears for the established order reflect each of the disruptive forces underlying the surface tranquility of Victorian life. The dangers of nationalism, imperialism, radicalism, socialism and collectivism, are all noted in Popular Government. Each is shown either as indicative of the direction in which society was moving or as the most likely consequence of that movement. These dangers had, of course, been implicit in society for some time. The actual incident which seems to have prompted Maine to return to writing on political issues was probably the defeat of the Conservative Government in 1880. The Liberal Government seemed to represent all the dangers which Maine feared. As Feaver has shown, the essays in Popular Government not only reproduced

articles written for the "Quarterly Review", but reflected certain ideas expressed, again anonymously, in the "St. James Gazette" in 1880. Feaver compares passages in the highly polemical articles with passages from Popular Government and concludes that, rather than being an academic critique of democracy, Popular Government was a disguised attack on the Gladstonian Administration.¹⁷ This is certainly an exaggeration, but it is true that Maine's political thinking, like that of Burke, was occasioned by contemporary events and that it is coloured by his personal political convictions.

TOTALITARIANISM

The predominant theme of Popular Government is not stated explicitly, but it underlies all Maine's attacks on democracy. It is his fear of the totalitarian state. In contemporary Britain, he believed that the threat in question lay in the tendency towards mass democracy, although he acknowledged the presence of the same danger in 19th century elitist theory. The danger of totalitarianism was that it would destroy, not only progress, that is the continual production of new ideas, but civilisation itself. The fabric of modern society was of a delicate nature. It required freedom, variety and the security of property to sustain itself. Their abolition would result in a system of control

simply to maintain a stagnant order. In effect, Maine was defending a nomocratic view of society with its concept of politics as a limited activity, against the antithesis of all its values - totalitarianism. Perhaps he best expresses this fear of totalitarianism when asserting his abhorrence of Rousseau's democratic state.

A vastly more formidable conception bequeathed to us by Rousseau is that of the omnipotent democratic State rooted in natural right; the State which has at its disposal everything which individual men value, their property, their persons, and their independence; the State which is bound to respect neither precedent nor prescription; the State which may make laws for its subjects ordaining what they shall drink or eat, and in what way they shall spend their earnings; the State which can confiscate all the land of the community, and which, if the effect on human motives is what it may be expected to be, may force us to labour on it when the older incentives to toil have disappeared.¹⁸

Having considered the basic theme of Maine's political thought, it remains to elucidate the factors which engendered it. According to Maine, theoretical analysis suggests and observation confirms that the widening of the franchise would enable the emergence of the political organiser - the "wire-puller". To retain popular support the manipulator would be committed both to an extension of the franchise, until universal suffrage was achieved, and to reflecting popular opinion. He believed that contemporary politicians were already ". . .listening nervously at

one end of a speaking-tube which receives at its other end the suggestions of a lower intelligence."¹⁹ Initially, popular government might be expected to be very active in reforming the social order, particularly in destroying every vestige of privilege which remained. This had been the nature of the increasing legislative activity since 1832. But now, not content with political representation the electorate were demanding greater control of their Members of Parliament. As Maine wrote:

. . . a movement appears to have very distinctly set in towards unmodified democracy, the government of a great multitude of men striving to take the bulk of their own public affairs into their own hands.²⁰

As a result in response to the pursuit of the ideal of equality, the area of state intervention gradually extends until all those enterprises formerly left to private individuals are directed by civil servants. For Maine this dualism of increasing democratic control within the party structure and the ever growing volume of controlling legislation, both blatant facts of the contemporary political scene, constituted the first stages en route to disaster. It represented a misunderstanding of the very nature of political activity, engendered by the 'scientific air' of utilitarianism. But perhaps more than this, it was a result of the growing interest of a populous ill-educated in public

affairs, who were gaining an unwarranted confidence in their capacity to govern. Unfortunately this interest might be overindulged since there was a limited amount of legislation which could benefit society.

Neither experience nor probability affords any ground for thinking that there may be an infinity of legislative innovation, at once safe and beneficent. On the contrary, it would be a safer conjecture that the possibilities of reform are strictly limited. The possibilities of heat, it is said, reach 2,000 degrees of the Centigrade thermometer; the possibilities of cold extend to about 300 degrees below zero; but all organic life in the world is only possible through the accident that temperature in it ranges between a maximum of 120 degrees and a minimum of a few degrees below zero of the Centigrade. For all we know, a similarly narrow limitation may hold of legislative changes in the structure of human society. We can no more argue that, because some past reforms have succeeded, all reforms will succeed, than we can argue that because the human body can bear a certain amount of heat, it can bear an indefinite amount.²¹

Clearly this is the nomocratic theme. Maine explains that it is not the function of government to take over control of society by legislative confiscation and direction. The area of government activity should be limited to that of trusteeship - the maintenance of law and order. To so increase the power of government that it might attempt to put into effect a teleological blue-print, such as the instigation of absolute equality, would surely result in disaster.

In his first essay, Maine examined the nature of this destructive legislation and the likely effect of overthrowing existing institu-

tions. The underlying assumption of the reformer was that

. . . the stock of good things in the world is practically unlimited in quantity, that it is (so to speak) contained in a vast store house or granary, and that out of this it is now doled in unequal shares and unfair proportions. It is unfairness and inequality that democratic law will some day correct.²²

This mistaken assumption, the failure to realize that the economic process is 'everywhere complex and delicate' could have the most serious of consequences. A portion of the labour force would be tempted into idleness by the promise of a share in the fictitious hoard of goods, whilst those willing to toil would eventually be disheartened by the confiscation of their rewards by taxation. If such a society is to avoid penury and starvation, then the incentives to toil which have been destroyed by the state must be replaced by its only alternative, the allotment of daily tasks enforced by the scourge. Although at this point Maine concludes that slavery would be the result of omnipotent state control, in other parts of his work the argument is not explicitly developed to this extent, rather the danger he cites is that of stagnation. After the short legislative period, when the prejudices of the masses hold sway in society, it is not unlikely that there will follow a period of reaction. In this event, even if new ideas were generated, it is unlikely that any use would be made of them, as Maine said in discussing average opinion:

The principles of legislation at which they point would probably put an end to all social and political activities, and arrest everything which has been associated with Liberalism. A moment's reflection will satisfy any competently instructed person that this is not too broad a proposition. Let him turn over in his mind the great epochs of scientific invention and social change during the last two centuries, and consider what would have occurred if universal suffrage had been established at any one of them. Universal suffrage, which today excludes Free Trade from the United States, would certainly have prohibited the spinning-jenny and the power-loom. It would certainly have forbidden the threshing-machine. It would have prevented the adoption of the Gregorian Calendar; and it would have restored the Stuarts. It would have proscribed the Roman Catholics with the mob which burned Lord Mansfield's house and library in 1780, and it would have proscribed the Dissenters with the mob which burned Dr. Priestley's house and library in 1791.²³

It is Maine's contention that it is the ignorance of the masses, the fact that they do not know what is their own best interest, which furnishes the principle argument against Bentham's logic. This failure, on the part of the majority, could produce a society which differed little from the stationary character of India and China.

The prejudices of the multitude against scientific inventions are dismissed by the historian with a sarcasm; but, when the multitude is all powerful, this prejudice may afford material for history.²⁴

The basis of Maine's fears regarding the emergence of a totalitarian state have been intimated: the dangers are there in the increasing volume of legislation; the growth of democratic control, the quest

for equality; and the prejudices, particularly the anti-scientific prejudices of the masses. And, although he attempts a reasoned attack on democratic theory on specific issues, the tips of these underlying fears repeatedly break through the surface of his argument.

In each of Maine's essays then, although the analyses are made from different standpoints, the particular style of argument involved provides but a thin veneer for his detestation of majoritarian tyranny. To suggest, however, that this negative theme was the only factor linking the essays together would be quite mistaken, since a powerful positive strain is also evident. It takes the form of an active support of the traditional constitution.

CONSTITUTIONALISM

Following an Aristotelian analysis, Maine was made aware of the importance of the popular element in the constitution and had no intention of advocating a return to a purely aristocratic form of government. Still less had he any desire to recommend the positivist notion of a controlling meritocracy grounded in social science. What Maine was doing was to support the traditional British form of government against any disturbance of 'that nice balance of attractions' and avoid the danger that it 'may yet be launched into space and find its last affinities in silence and cold'. The hope of free institutions lay in this 'unique

and remarkable' instrument which had successfully reconciled satisfaction and impatience, and achieved a suitable compromise between the popular and aristocratic elements in society. Unfortunately, the ancient notion of a balanced constitution was under attack from reformers armed with arguments provided by Rousseau and Bentham. Their thesis was that Second Chambers were superfluous since the Popular Chamber reflected the opinions of the entire community, that Vox Populi was Vox Dei. Seeing that such an argument would be fatal to the House of Lords, Maine questioned its fundamental proposition that the voice of the people was the voice of God. His thesis was not that the members of the Popular Chamber are always mistaken, or even generally wrong. He was merely of the opinion that

. . . it is impossible to be sure that they are right. And the more the difficulties of multitudinous government are probed, and the more carefully the influences acting upon it are examined, the stronger grows the doubt of the infallibility of popularly elected legislatures. What, then, is expected from a well-constituted Second Chamber is not a rival infallibility, but an additional security. It is hardly too much to say that, in this view, almost any Second Chamber is better than none.²⁵

The Second Chamber argument was based on the desire for restraint and consideration, the security of an additional body to give a full examination of the various measures proposed by the Popular Assembly.

Maine's support of the British constitution, particularly for the House of Lords, was a reflection of his general attitude towards politics. He believed that the balance of the traditional Constitution provided a suitable 'mean', a reconciliation between the absolutist extremes of monarchy and democracy. Politics was a practical concern dealing with the harmonization of interests, the avoidance of extreme action, the maintenance of individuality and freedom, an activity within a given tradition of custom and precedent. The requisite virtues for participation were political wisdom and the attributes of a 'gentleman'.

In Maine's view, the House of Commons would still be the more important body, of course, but with the assistance of the aristocracy, the very difficult process of change could be more safely accomplished. His idea of limiting the sphere of state activity is intimately linked with the notion of change and it was in this sphere that the aristocracy had an important part to play. In the general discussion of Second Chambers, Maine's major argument had been that they provided an additional check on the political process. He believed that the House of Lords was particularly suited to such a restraining role. It was an ancient part of the British Constitution, the repository of the political wisdom of long experience, and imbued with the notion of change within the framework of tradition. With such a safeguard on the Popular Assembly,

the totalitarian threat in universal suffrage might be averted.

More than this must be said about Maine's ideas relating to change, however, since they are fundamental both to his fears and prescriptions. His position is made explicit in his third essay and the following three quotations from the text outline the propositions from which the whole of his thesis is logically derived. He argued that:

The natural condition of mankind (if that word 'natural' is used) is not the progressive condition. It is a condition not of changeableness but of unchangeableness. The immobility of society is the rule its mobility is the exception.²⁶

Consequently,

If modern society be not essentially and normally changeable, the attempt to conduct it safely through the unusual and exceptional process of change is not easy, but extremely difficult. What is easy to a man is that which has come to him through a long inherited experience, like walking or using his fingers; what is difficult is that in which such experience gives him little guidance or none at all, like riding or skating. It is extremely probable that the Darwinian rule "small changes benefit the organism", holds good of communities of men, but sudden sweeping political reform constantly places the community in the position of an individual who should mount a horse solely on the strength of his studies in a work on horsemanship.²⁷

Given this limited capacity of human nature to adjust to new conditions, then,

The utmost it can do is to select parts of its experience and apply them tentatively to these conditions; and this process is always awkward and often dangerous.²⁸

Maine's position is derived from these three propositions: one, change is not man's natural condition; two, adjustment to new circumstances is difficult; and three, the safest method of change is within the comprehensible framework of experience. Implicit in the second quotation is perhaps a fourth fundamental principle, namely, the incommunicability of experience and skill, which he uses to justify aristocracy.

His fear of the dangers of democratic rule was grounded in the fact that not only was political power being given to a class of persons unacquainted with the nature of politics and its essential skills, but that this new leadership failed to understand the fundamental nature of change. Pursuing *à priori* political theories, the reformers were able to appeal to the passions and prejudices of the masses, believing that society could be moulded into their own particular image of utopia once power had been won. Yet the outcome of such political naivety, such a travesty of the fundamental axioms of political experience, was quite obvious to Maine.

A community with a new *à priori* political constitution is at best in the disagreeable position of a British traveller whom a hospitable Chinese entertainer has constrained to eat a dinner with chopsticks. Let the new institutions be extraordinarily wide of experience and inconvenience becomes imminent peril. The body-politic is in that case like the body-natural transported to a

new climate, unaccustomed food, and strange surroundings. Sometimes it perishes altogether. Sometimes the most unexpected parts of its organisation develop themselves at the expense of others; and when the ingenuous legislator had counted on producing a nation of self-denying and somewhat sentimental patriots, he finds that he has created a people of Jacobins or a people of slaves.²⁹

Now since Popular Government involves a defence of the traditional order of society, it may be characterised as in some way conservative. Most commentators on Maine's work have indeed, as noted above, placed him roundly in the modern system of conservative orthodoxy deriving from Burke. Yet the analysis of Popular Government alone suggests that such a categorization is quite mistaken. Even allowing for the fact that Maine was responding to an immediate political situation, and was not attempting to analyse the foundations of society, the work fails to reveal even the tones or textures which might have been expected from a disciple of Burke. Two important commentators on Maine's thought in the 1930's have also noted his divergence from the orthodox stream, namely Crane Brinton and B.E. Lippincott. Brinton claims that Maine can be seen as a turning point in English conservatism, in the same way that Green marks a turning point in English liberalism. This is because "Just as Green is a liberal who, in spite of certain qualifications, trusts the State, . . . so Maine is a conservative who distrusts the State."³⁰ It is a "conclusion", he continues, "that would have profoundly

shocked Burke."³¹ Lippincott, on the other hand, sees the break in respect of the religious basis of conservatism which Maine did not employ. He said, ". . . Maine represents the best attempt in the 19th century to justify conservatism to a new age. Following the rationalist movement of his era, he broke with the conservative tradition of Burke, Coleridge, and Stephen, and rejected religion either as a basis upon which to construct conservative philosophy, or as a factor essential to its building." Instead, Lippincott saw Maine as ". . . the first but also the last 'scientific conservative' in English political thought. . ."³² But although these two writers noted that Maine was not an orthodox conservative, they failed to see him as part of any main stream of ideas in English political thought. The attempt to establish Maine in a distinct tradition of conservatism constitutes the object of the remainder of this chapter.

Both the style and the content of Popular Government can be identified with that brand of conservatism expressed in the work of David Hume and recently continued in the writings of Michael Oakeshott. On many issues there is an apparent agreement between the two traditions, as S.R. Letwin says, "The difference between Hume and Burke is one of atmosphere and emphasis. . ." But even where agreement existed, the underlying assumption from which their positions derived were quite different, as they had ". . . a totally different view of political activity."³³

The orthodox position has already been discussed. It is now necessary to examine the alternative conservative tradition in order to demonstrate that Maine has greater affinities with it than with the Burkean position.

ANALYTICAL CONSERVATISM

To determine the nature of "analytical conservatism", as Sheldon S. Wolin has called it, it might be useful to note its fundamental difference from the Burkean tradition. This is the absence of any metaphysical system supporting the conservative disposition. Hume's conservatism was eminently empirical, rooted in arguments devoid of transcendental notions. His faith was in the concept of utility embodied in concrete institutions and traditions. The moderate temper of his thought reflected the 'peace of Augustans' - the relative tranquility of the English political scene in the 18th century.

In contrast, modern conservatism was essentially a reaction to the crisis of revolution. It was considered necessary to protect the conservative disposition by formulating an 'intellectual system', a general schema from which political action could be both justified and determined. The conservative reaction to the French Revolution thus engulfed Hume's style of politics. Conservatism

. . . turned to transcendental norms in order to combat the revolutionary appeal to reason; to weave from the diverse elements of irrationalism,

romanticism, religion, and history a new vision of an older order; to replace an analytical conservatism by a metaphysical naturalistic approach and substituted in its stead a philosophy of history, the idea that history had a "course" whose main outlines were determined by a divine hand operating from outside the confines of human time.³⁴

This, then, constitutes the real difference; one system is permeated by a religious-metaphysical philosophy, the other, secular, sceptical and pragmatic, regarding a system of belief as quite unnecessary to the conservative disposition in politics. Oakeshott considers the confusion generated by Burke's 'selection of long-current and well-tried notions' which has given 'substance and colour' to all subsequent writers to have been unfortunate. He has said that

. . . on account of his speculative moderation and his clear recognition of politics as a specific activity it would perhaps have been more fortunate if the modern conservative had paid more attention to Hume and less to Burke.³⁵

However, this different approach to the nature of political activity, the lower plane upon which analytical conservatives had placed politics, has had certain practical consequences. Hume's scepticism resulted in a cautious view of the extent and character of government control, whereas Burke's religious vision and his recognition of the need for authority, enabled him to place much greater importance on the activity of the state. This extravagance to be found throughout Burke's work was symptomatic, not only of contemporary upheavals and his religious belief, but

of a change in the actual practice of 18th century government. Politics was becoming less concerned with mere trusteeship, the protection of property and privacy and the reconciliation of conflicting interests, than with the pursuit of national glory and dignity. In short, in translating political issues into moral crusades, a disposition that "Hume called fanaticism and feared above all in politics,"³⁶ Burke made politics a much more important activity than Hume had been prepared to acknowledge. It went beyond policing activities to sanction a certain paternalism. The State, together with the Church, became the guardian of the 'Temple of God'.

It would seem, then, that the analytical conservatives' approach towards political activity was essentially empirical, rejecting both rationalism and Burkean 'metaphysics'. It revived Aristotelianism in a purer form than the Burkeans, who blurred its methods with their Thomist ideas. The importance of secular tradition to those who followed Hume was paramount and coloured all aspects of their thought - their admiration of the British Constitution, their concept of change, their idea of the legitimate area of governmental competence and of political education. For the sceptic, the particular tradition into which one was born determined the appropriate nature of one's activity in every aspect of life. Certain standards of behaviour were expected, a specific way of 'doing things' was followed, determined by the precedents and customs of

the community. This manner of activity extends also to the political sphere. It was fruitless to wish that circumstances had been other than they were: one had to make the most of a given situation by familiarizing and adjusting oneself to this real world. The relevant political tradition for analytical conservatism, then, was that institutionalized in the British Constitution.

The admiration for this 'remarkable and unique' institution is evident in the work of Hume, Maine and Oakeshott, although none of them regard it as in any way the work of a divine Providence in the way that Burke did. Rather it is seen as the product of contingent circumstances - a series of fortuitous changes. Letwin says of Hume:

Even the excellence of the British Constitution, he often pointed out, was mainly the work of fortune; history teaches us what a "great mixture of accident . . . commonly concurs with a small ingredient of wisdom and foresight in erecting the complicated fabric of the most perfect government."³⁷

At the end of his first essay, Maine makes a similar suggestion, claiming that the British Constitution had become the 'envy of the world' by 'a series of undesigned changes'. And Oakeshott also refutes any idea that parliamentary government sprang from rational principles, maintaining that it 'emerged' from the political circumstances of the Middle Ages. Indeed, they have all argued that the rights and freedoms demanded by reformers in so many countries were not some abstract ideal realized in England by

the bloody revolution: they were the long established Common Law rights of Englishmen. The parallel between Oakeshott and Maine on this, as on so many issues, is remarkable. Speaking of Natural Rights Oakeshott has said that:

For many years now, these children of our own flesh have been returning to us, disguised in foreign dress, the outline blurred by false theory and the detail fixed with uncharacteristic precision. What went abroad as the concrete rights of an Englishman have returned home as the abstract Rights of Man, and they have returned to confound our politics and corrupt our mind.³⁸

Similarly, Maine wrote:

The English political institutions, so envied and panegyrised on the Continent, could not be copied without sweeping legislative innovations, but the grounds and principles on which these innovations were demanded were, as we shall see, wholly unlike anything known to any class of English politicians. Nevertheless, in their final effects, these French ideas have deeply leavened English political thought, mixing with another stream of opinion which is of recent but still of English origin.³⁹

In England, then, the security of the individual was guaranteed by the fact that government proceeded within the given framework of custom and law, thus enabling all to know the limits of government action in given circumstances.

Of equal importance to the admiration of the balanced constitution in the kind of conservative thought we are considering is the belief

that the balance of political machinery can easily be destroyed. It has been indicated that Maine feared that the growth of popular representation threatened the balance of forces. This theme is again taken up by Oakeshott when he analyses the danger of mass society in his essay 'The Masses in Representative Democracy'. Here he argues that Parliamentary Government, which reached its maturity in the late 18th and early 19th centuries, was a direct response to the emergence of the individual from ascriptive ties in the 14th and 15th centuries.- in Maine's terms the movement from status to contract. The function of government was to protect the individual and secure his rights.

In this condition every subject was secured of the right to pursue his chosen directions of activity as little hindered as might be by his fellows or by the exactions of government itself, and as little distracted by communal pressures. Freedom of movement, of initiative, of speech, of belief and religious observance, of association and disassociation, of bequest and inheritance; security of person and property; the right to choose one's own occupation and dispose of one's labour and goods; and over all the "rule of law": the right to be ruled by known law, applicable to all subjects alike. And these rights, appropriate to individuality, were not the privileges of a single class; they were the property of every subject alike. Each signified the abrogation of some feudal privilege.⁴⁰

Oakeshott saw that the rule of law was threatened by the emergence of the "anti-individual" and his accompanying philosophy, the demand for numerical democracy. The responsibility of self-determination proved

more than many people could bear, since it emphasized their own inner inadequacies. Consequently, these men have united in a demand for equality, not to augment individualism, but to obtain security against it. The omnipotence of the state had to be imposed on all. For to allow the individuality of some to continue would, by demonstrating the total inadequacy of others, threaten their emotional security and consequently the security of the "social protectorate". In this way the state received an invitation to become the complete manager of the community, destroying all the values obtained by the rule of law under parliamentary government. Support has been given to leaders on all issues to save the individual from the necessity of reaching his own decisions. The mandate and representation have become meaningless, the populace simply being 'used' to sanction the policy decisions of their rulers.

Thus, Oakeshott, like Maine, felt that democratic government was a threat to the parliamentary system of rule. The various liberties implicit in the political tradition, freedoms which appeared before the advent of democracy, were now being threatened by the demands of the anti-individual. Both appealed to the tradition of the balanced constitution and its rule of law in an attempt to retain liberty and individuality against the omnipotent state.

Some indication has been given above of the character of the analytical conservatives' approach to political change. It was essentially empirical. Politics was concerned with the realization of the immanent potential of circumstance and the reconciliation of the inconsistencies which changing conditions created. Political activity was seen strictly as a process of repair. Now lying behind this extremely cautious approach to political activity is an intense awareness of the kind of knowledge which is appropriate to the political art. And it is only by giving due attention to this that a real appreciation of the analytical conservatives' position can be secured. Once again it is to Oakeshott that we must turn for the most developed expression of the theme. In his essay on "Political Education", he makes a distinction between ideological and traditional manners of political behaviour, a distinction which can be compared with his division between technical and practical knowledge in his more general discussion. Technical knowledge, like political ideology, is an abridgement, the distillation of what is considered to be significant data. It is communicable in precise terms to the relative novice. In contrast, practical knowledge is the whole body of an activity, imprecise, and is incommunicable except among the initiated. Both technical and practical knowledge are useful to the politician, but because of the complexity of his activity, he must rely primarily on his practical ex-

perience. His inspiration stems from traditional patterns of behaviour and from the manifold intimations of concrete circumstances. In this opinion Maine and Oakeshott are again in remarkably close agreement. Indeed, Maine's analogy of the dangers involved in attempting to rule society from the basis of an à priori constitution being similar to those confronting anyone trying to ride a horse simply from the understanding of a manual on horsemanship, might, from the nature of its composition, be mistaken for one of Oakeshott's own comparisons.

Unfortunately, the belief that political wisdom is not a technique, some very specialized branch of knowledge, but a familiarity with the traditions of society and an ability to feel where the shoe pinches, has produced a great amount of confusion and even misrepresentation. The major stumbling block appears to lie with the interpretation of the "traditionalists'" understanding and use of principles. Some of the issues raised by this discussion might be profitably dealt with at this point since it will help to clarify to a greater degree the particular beliefs of the tradition of thought to which Maine belonged.

PRINCIPLES AND CONSERVATISM

The rejection of what Barker has called 'first principles' in politics does not mean that conservatives rejected all principles. To clarify the overall conservative position in this respect, the analysis

given recently by Brian Barry in his book Political Argument might be employed. He describes two major groups: the first he calls Anti-Political Conservatism; the second, Anti-Rationalist Conservatism.

The first group believes that although principles have their use, they have proved to be dangerous in the political life. Even if one dismissed the assertion that a state attempting to realize "ideal regarding" principles of social justice must be ". . . torn apart or brutally unified by a totalitarian government based on terror," it might still be argued that, ". . . although there may be particular times when competing principles are not so wide apart that attempts to implement them lead to unmanageable strife, nevertheless, it is dangerous for the idea to get around that principles have a legitimate place in politics because you can never be sure when different people's principles won't be disastrously incompatible."⁴¹ As Barry goes on to say, this argument is unacceptable. In this case a distinction can be made between principles which are permissible and those which are not. It is thus not an argument against principles as such. The point might be left by noting that the 'Anti-Political Conservative' regards principles as a valid part of man's mental apparatus, but fraught with dangers when employed in the realm of politics.

The 'Anti-Rationalist Conservative', on the other hand, rejects the use of principle in any sphere. He believes that instead of relying

on discursive reasoning, men should put their trust in intuitive judgement. It would seem, to put the distinction at its crudest level, that one tradition merely questions the wisdom of using principles in politics, whilst the other rejects all principles.

It has been indicated above that Maine, although a traditionalist, did retain a belief in the efficacy of principles. He recognised that the major developments in society were often inspired by some great and fundamental belief such as that of Natural Law or utility. Given then, this belief in abstraction, which had been of great importance in the realm of law, it might appear that Maine and his tradition can fit snugly into that group which Barry has called the 'Anti-Political Conservatives'. But before reaching any premature conclusions on this question, it is essential that the actual nature of the principles we are discussing should be made clear. So far we have used the word 'principle' to signify a highly abstract generalisation, a construction of an ideal from the materials of experience. But there are also principles of a much more modest character, not high level abstractions, but simply guides "extracted from expertise." These are relevant maxims, reasons or considerations which might arise in any serious discussion. It is not claimed that they form a complete account of conduct however fully they may be developed. Nor are these principles, when once expressed, held to be in any way self-evident and absolute; each derives its rele-

vance from the context in which it is used.

Clearly this particular understanding of principles places a rather different complexion on Barry's analysis. Failing to recognise the two different levels of discussion, the principles which he ascribes to the 'Anti-Political Conservatives' are of the abstract variety. And indeed, certain conservative thinkers, such as Hayek, do hold such principles not only in apolitical realms, however, as Barry suggests, but also within the political sphere itself. Note, for example Hayek's suggestion that an ideology of freedom is necessary if we are to successfully defend our possession of that freedom.

Barry's second group of conservatives, the 'Anti-Rationalists', those whom he believes held no belief in principles whatever, might now be seen as adherents of the limited kind of principles which have been described above. By ignoring these and concentrating exclusively on the usual abstract character of generalisation, then the appearance would be given of a total rejection of all principles.

The question as to which category Maine belongs can now be answered. His belief in principles, even in those of Natural Law and utility, was strictly limited. Major principles, he believed, should be used to point our energies in the right direction, not to control the application of those energies. This was the reason for his admiration of the Roman use of Natural Law, which gave a general directive

to achieve harmony and uniformity without giving specific instructions. It was also the reason for his depreciation of its later manifestation in the hands of Rousseau who shaped it into an all embracing doctrine. No, like Oakeshott, Maine believed that European politics could only be conducted in safety if the principles employed were those for a limited and not for a universal application. It is apparent, then, that Maine belongs to the group of conservatives designated the 'Anti-Rationalists', once this term has been understood to apply to those people who make a limited use of principles. And this seems to be yet a further facet of Maine's alienation from the orthodox conservative tradition, since it appears that the identification of the 'Anti-Political Conservative' with the Burkeans and the 'Anti-Rationalists' with the analytical conservatives, would, in broad terms, be acceptable. It must be pointed out, however, that the association of Burke and his followers with the 'Anti-Political' group is not a conclusion reached by Barry himself. Indeed, Barry would group Burke and Oakeshott together as belonging to the main conservative tradition. But it has been made clear above that such a classification is quite meaningless.

The conclusion here reached, then, is that in a period faced with the dangers implicit in the emergence of mass society, Maine brought to bear the soothing voice of an old tradition of English conservative thought. His was not, as some writers have suggested, the response of

a frightened reactionary, a man refusing to come to terms with the social facts of the time. He claimed no metaphysical support for his recommendations, support which Burke facing similar dangers had found indispensable. He rose above the kind of dogmatism which permeated so much Victorian thought and which he was attempting to combat. In these respects, Maine's work appears as an outstanding contribution to political thought. Unfortunately, like the other writers of his kind, his ideas have been misrepresented by commentators attempting to present him as a more orthodox thinker than he was. If this distortion is ignored, Popular Government appears as the most outstanding work of analytical conservatism written in the 19th century.

REFERENCES

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Chapter Four : References

<u>Page</u>	<u>Ref. No.</u>	<u>References</u>
121	1	<u>Conservatism from John Adams to Churchill</u> ; P. Viereck; p. 32.
121	2	<u>The Conservative Mind</u> ; R. Kirk; p. 15.
122	3	<u>ibid.</u> , p. 276.
122	4	Viereck; <u>op. cit.</u> , p. 11.
124	5	Quoted in <u>Conservatism in America</u> ; C.L. Rossiter; p. 24.
125	6	<u>The Conservative Tradition</u> ; R.J. White; p. 1.
126	7	<u>Conservatism</u> ; Lord Hugh Cecil; p. 8.
127	8	Kirk; <u>op.cit.</u> , p. 17.
128	9	White; <u>op.cit.</u> , p. 8.
129	10	See <u>Edmund Burke and the Natural Law</u> ; P.J. Stanlis.
129	11	White; <u>op.cit.</u> , p. 1.
131	12	Kirk; <u>op.cit.</u> , p. 283.
131	13	See 'The Political Attitude of Sir Henry Maine: Conscience of a Nineteenth Century Conservative'; G.A. Feaver; <u>Journal of Politics</u> ; 1965. p. 293.
131	14	Quoted in <u>England in the Nineteenth Century</u> ; D. Thomson; p. 148.
132	15	<u>Modern British Politics</u> ; S. Beer; p. 45.

Chapter Four : References

<u>page</u>	<u>ref. no.</u>	<u>references</u>
133	16	See "Liberalism and the Victorian Intelligentsia"; J. Roach; <u>Cambridge Historical Journal</u> , 13; 1957.
135	17	See Feaver; <u>op.cit.</u>
136	18	<u>Popular Government</u> ; Sir Henry Maine; p. 158.
137	19	<u>ibid.</u> , p. 38.
137	20	<u>ibid.</u> , p. 92.
138	21	<u>ibid.</u> , p. 149.
139	22	<u>ibid.</u> , p. 45.
140	23	<u>ibid.</u> , p. 35.
140	24	<u>ibid.</u> , p. 147.
142	25	<u>ibid.</u> , p. 180.
144	26	<u>ibid.</u> , p. 170.
144	27	<u>ibid.</u> , p. 171.
145	28	<u>ibid.</u> , p. 175.
146	29	<u>ibid.</u> , p. 175.
146	30	<u>English Political Thought in the 19th Century</u> ; C. Brinton; p. 279.
147	31	<u>ibid.</u> , p. 281.
147	32	<u>Victorian Critics of Democracy</u> ; B.E. Lippincott; p. 169.

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<u>page</u>	<u>ref. no.</u>	<u>references</u>
147	33	<u>The Pursuit of Certainty</u> ; S.R. Letwin; p. 122.
149	34	'Hume and Conservatism'; S.S. Wolin; <u>American Political Science Review</u> ; 1954; p. 1015.
149	35	'Conservative Political Thought'; M.J. Oakeshott; <u>The Spectator</u> ; 193; 1954; p. 7474.
150	36	Letwin; <u>op.cit.</u> , p. 123.
151	37	<u>ibid.</u> , p. 98.
152	38	'Contemporary British Politics'; M.J. Oakeshott; <u>Cambridge Journal</u> ; 1948; p. 490.
152	39	<u>Popular Government</u> , p. 136.,
153	40	'The Masses in Representative Democracy'; M.J. Oakeshott; <u>Freedom and Serfdom</u> ; p. 156-157.
157	41	<u>Political Argument</u> ; B. Barry; p. 55.

CHAPTER FIVE

CHAPTER FIVE
HISTORY AND POLITICS

THE STRUCTURE OF THE ARGUMENT

Now that both Maine's historical and political positions have been examined, it will be helpful to consider the relationship existing between the two. The first part of this chapter will, therefore, be concentrated on Maine's own understanding of this relationship; the second part will be concerned to clarify Maine's position and to expose the foundations of his argument; the third, to discuss the various interpretations of his work as a whole; and the last to give some account of the major criticisms which have been directed against Maine's method of analysis.

THE RELATIONSHIP BETWEEN HISTORY AND POLITICS

The basic postulate upon which the whole structure of Maine's thought rests is that there is some identifiable continuity to be traced from the earliest ideas of mankind to their very latest emanation. He believed that in order to secure a complete understanding of the contemporary world, it is appropriate to elucidate the origins of ideas

and institutions. Maine was far from being unique in this leaning towards historical explanation; Hegelians, Positivists and Socialists were all concerned with history in the 19th century. The particular demands made on history differed widely among the various theorists: some demanded a knowledge of society's future developments; others, a guide to practical activity; and the less ambitious, an understanding of the here and now. All were unanimous, however, in believing that history provided an invaluable source of material for generalisation and prediction. Although this particular appreciation of history is now questioned, it did represent a considerable advance over previous interpretations in which the past had often been regarded as little more than a record of man's mistakes or, at best, as a means of supporting a political purpose.

The most ambitious of these new investigations were the philosophies of history which were concerned with events on a world scale. Not content with empirical research into a limited aspect of man's past, it was believed that the laws of historical change, and even human destiny itself, could be discerned through an examination of world history. Under the impact of scientific achievements, historians and philosophers, such as St. Simon, Comte and Marx, attempted to create a science of society - to reduce the vast multiplicity and diversity of historical material to some kind of causal order. In each

case, the product of their labours was a vast synthesis, a universal, irresistible theory of development: a general law or explanation under which all the "facts" of history might be subsumed and allotted their special place. The nature of political activity, it was believed, was strictly determined by historical forces. In the 20th century, similar analyses have been undertaken in the work of Spengler, Toynbee and, on a different plane, by Karl Jaspers.

Maine's own scheme of analysis was, however, much less ambitious. His concern, as he said, was to understand the nature of contemporary progressive society by referring to those less fortunate civilisations which had remained in a stationary condition. But this in itself would not necessarily exclude him from the fold of universal historians. Ranke, for example, was amongst those who believed "World history was the history of the West."¹ What does exclude Maine is that he was only interested in a limited aspect of that history, namely, in the character of man's earliest social ideas and institutions. That he was not prepared to develop a complete history of man's evolution must not, as it has been indicated above, be misconstrued. He clearly felt that a detailed analysis of the whole of western society's evolution could be of great value, as there had been important periods since the breakdown of ancient society which had been influential in contributing to the make up of contemporary culture. (Witness, for example, the

peculiarities of modern land law attributable to the feudal period.) Faced with an overwhelming amount of material, Maine dealt with the area he considered of greatest importance. Once the germs of all the important concepts had been delineated in their primeval form, then the tracing of their later manifestation would not only be much easier, it would be much more productive of significant information; In short, the full implications of a concept's later developments could only be appreciated if its original function was also borne in mind. Sir Frederick Pollock admirably sums up the role which Maine played in laying down this foundation of historical research.

Nowadays it may be said that "all have got the seed," but this is no justification for forgetting who first cleared and sowed the ground. We may till the fields the master left untouched, and one man will bring a better ox to yoke the plough, and another a worse, but it is the master's plough still.²

Although an inquiry into early civilisation as a prelude to an understanding of the present or future, or even as the basis of political activity, is now regarded as either unnecessary or inappropriate, such inquiries are not unknown. Indeed, the highly regarded German thinker Karl Jaspers, in his work The Origin and Goal of History, uses a method similar to that of Maine as a basis for his speculations. A comparison of some of the points of contact might be useful in understanding Maine's position.

Neither Jaspers nor Maine attempts to define the nature of man in prehistory. Unquestionably, Maine would sympathize with Jaspers' view that "Prehistory is that section of the past which, although it is in fact the foundation of all that comes after, * is itself unknown . . . [and yet] . . . The evolution of man in prehistory is the development of the basic elements constituting humanity. His evolution in history is an unfolding of inherited contents of a spiritual and technical nature. The basic constitution took an immeasurable period of time in which to develop; by contrast, historical evolution has the appearance of something taking temporary shape in works, notions, thoughts and spiritual configurations on the broad and deep foundations of humanity, which was evolved in prehistory and is still real today. . . . Historical consciousness is now confronted by the major question of man's basic stock as inherited from the ages before history, of this universal fundament of humanity. Man is alive with subterranean forces from the ages during which this human nature came into being. If we could know prehistory we should gain an insight into one of the fundamental substances of humanity, by watching it come into existence, by seeing the conditions and situations that made it what it is."³

Jaspers continued that by securing a knowledge of prehistory, the primary motives underlying man's activities, which were shaped in

* my italics

this unrecorded era and yet remained beneath the veneer of civilisation, might be better understood and even moulded in such a fashion as to avoid stumbling into the abyss of a new Stone Age. Maine, too, regretted the non-availability of reliable evidence regarding the earliest stages of civilisation since such material that was accessible confirmed his belief that the understanding of society in its simpler, primeval forms, could prove an invaluable instrument for appreciating the contemporary world. He believed that the evidence showed that,

. . . the differences which, after ages of change, separate the civilised man from the savage or barbarian, are not so great as the vulgar opinion would have them. Man has changed much in Western Europe, but it is singular how much of the savage there still is in him . . .⁴

It is hardly surprising that with such sympathies these two writers, frustrated in their knowledge of prehistory, should, nevertheless, feel that to construct a detailed framework of man's early social organisation would still be of great importance in understanding man's evolution.

Maine felt that the most significant area of investigation was the era in which man's social organisation was structured around the patriarchal family. It was in the ideas implicit in this primordial association that the fundamental concepts regarding man's social life had been germinated. It was true that later periods had often been decisive in shaping the character of future development. Consider for example the era of codification through which all societies passed, or that in which

the belief in Natural Law held sway in the western world; but these influences had either to frustrate or encourage the original ideas produced by the patriarchal society. For Jaspers, however, the decisive age in man's development, which he calls the 'axial period', is that point in human history which ". . . gave birth to everything which, since then, man has been able to be, the point most overwhelmingly fruitful in fashioning humanity . . . [It is] . . . to be found in the period around 500 B.C., in the spiritual process that occurred between 800 and 200 B.C. It is there that we meet with the most deep cut dividing line in history. Man as we know him today came into being."⁵ Thus, although the actual periods which Maine and Jaspers selected as crucial for the history of mankind were not the same, they did agree on the more fundamental question of methodology: it was only by reference to an epoch of history in which man's contemporary heritage had been given its initial form that a correct perspective of the present, and for Jaspers, the future also, could be secured.

Maine was content to limit his studies to a detailed analysis of ancient society and in this essentially conservative approach he is set apart from many of his contemporaries. He was resolved to produce a full and detailed account of the past based on the available evidence, eschewing all methods which went beyond the 'facts' to defend some grandiose

and inevitable pattern of development. We may agree with Diamond who points out that Maine's own analysis really rests upon very limited historical material. But even allowing this, the whole atmosphere of his work is of a much more moderate kind than that of many 19th century historians.

Unfortunately, Maine made little comment on the various examples of historicism so prevalent among his peers, but perhaps some indication of his attitude might be gleaned from a reference made to various systematizers when recommending the virtues of Austin's approach to jurisprudence:

Now nothing could be more unfortunate for the philosophy of law than the "Province of Jurisprudence Determined" should come to be regarded simply as Austin's system - as standing by the side of Blackstone's or Hegel's or any other system - as interchangeable with it or equivalent to it.⁶

Thus despite certain comparisons which have been made between Maine and Hegel, Maine himself seems to have had little regard for the system builders. We may agree with the article on Maine in the 1902 edition of the Encyclopedia Britannica which states that: "Foreign readers of Maine have perhaps understood even better than English ones that he is not the propounder of a system but the pioneer of a method."⁷ Pollock made much the same point in his introduction to Ancient Law when he rejected the criticism made by continental scholars, namely that Maine's work failed

to present a complete systematic construction, a finished whole. It was simply not his intention to produce such a work, his aims were modest, merely to make some contribution to legal history and its methodology.

The nature of this methodology has been alluded to, it was the application of the critical techniques of the great German school of history to legal studies. Maine believed that thought could only be understood completely when the society which had produced it had also been comprehended, and vice-versa. Consequently, he aimed at a thoroughly detached and objective analysis of the past, lifting history out of the realm of retrospective politics and romantic interpretations, which in the works of Carlyle and Macaulay were still prevalent in the 19th century. He wished to write a more "scientific" kind of history, an appraisal of events and ideas as objective as any of the treatises to be found in natural science.

Assuming for the moment that such a history is possible, what would be the result? Would generalisations regarding the past be the limits of such a scientific method? Or, would Maine join the ranks of those 19th century historians who claimed Elijah's mantle and insisted that because of their knowledge of the laws of history, the future condition of mankind had been revealed to them? With regard to the latter, clearly not; for although Maine did make frequent use of scientific

analogies, claimed to be utilising scientific methodology, and hoped to secure scientific generalisations, his actual work offers little to support such claims. He was a historian, not a historiographer, and his admiration for science, fortunately, had little impact on his work which continued to be careful, moderate and historical. In his flirtation with the language of science, however, and the limited use to which he actually put its methods, Maine might be compared with another great 19th century anthropologist, E.B. Tylor. As Irving Goldman in his article "Evolution and Anthropology" maintained, ". . . Tylor was diffident about offering grand evolutionary concepts, although like his contemporaries, he spoke freely of 'laws' and of 'uniform stages' of development."⁸ Maine was concerned simply with generalising the process of change from the past to the present. Regarding the future, he would probably, because of his great faith in the efficacy of ideas in producing radical change, be in sympathy with those views expressed by Karl Popper in The Poverty of Historicism. Here Popper argued that the prediction of a future order of society was impossible simply because man's future state of knowledge could not be known in the present.

But often the utilisation of history was not taken to such extreme lengths: without postulating any future utopia, it could be used, so it was thought, as a guide to political activity - a useful source of precedents for determining rational conduct. This essentially

practical and moderate approach was much more popular among the English historians than the more ambitious continental philosophers of history. It was exemplified in the works of such men as Seely, who according to E.E. Kellett, refused to call anyone a true historian who failed to draw valid political conclusions from their historical inquiries,⁹ and one of Maine's own students, the Comtist Frederic Harrison. In his book The Meaning of History, Harrison, not following his master Comte too closely at this point, presents a very clear statement of this second, practical interpretation of the past. The work may be used as a focal point in the examination of this view point.

The broad outline of Harrison's position is that the whole of our present world is the product of the past: our institutions, customs, traditions, forms of art and science, language and manner of thought - all of man's consciousness, in fact, is the product of his past development. Without a knowledge of the world's heritage, irrespective of the intelligence of man, ". . . it would be impossible to think, for the world would present one vast chaos. . ." ¹⁰ Indeed, without a knowledge of what has passed away the very process of thought itself would be unattainable. The civilisation into which one is born provides both the form and the content of communication, without which man would be reduced to the level of the animal. Harrison continues:

Now, if this be true, if we are so deeply indebted and so indissolubly bound to preceding ages, if all our hopes of the future depend on a sound understand-

ing of the past, we cannot fancy any knowledge more important than the knowledge of the way in which civilisation has been built up.¹¹

Society is an organism with its own laws of growth and consequently change must be in accordance with natural processes unless some monstrous deformed creature is to be born. "Nothing but a thorough knowledge of the social system based upon a regular study of its growth, can give us the power we require to affect it. For this end we need one thing above all - we need history."¹² The position is thus clear, every account must be taken of history if political action is to be meaningful. But this late 19th century application of history to politics is much more sophisticated than some of the crude practices of the 18th and 19th centuries; Harrison himself made direct reference to the use of history as a mere store of political maxims and suggested that it ". . . might do more harm than good. You may justify anything by a pointed example in history."¹³ Harrison might agree with Sidgwick that, regarding the evolution of society, "history is past politics, politics present history,"¹⁴ but this did not reduce their discussion to the level of supporting *a priori* doctrines by an appropriate selection of historical evidence.

Maine had sympathy with the practical employment of history as advocated by the positivists. His whole scheme of inquiry had been to correlate ancient and modern thought with the view of making the latter

more intelligible. But the major question of his identification with Harrison's style of history is to determine his attitude to the role which he saw history performing in bringing about rational change. Both Maine's concept of historical growth and his position on political change have been discussed. What is required now is to elucidate the nature of their relationship. Some difficulty is apparent at this point as Maine's position is unclear. He seems to hold two views of a contradictory nature: one, indicative of a belief in historical inevitability; the other, suggestive of a belief in change according to man's resolution of inconsistencies within the existing social structure. To make clear the relationship existing between his historical and political work, it is necessary that these positions be analysed in their most extreme manifestations.

The first standpoint would seem to indicate that Maine felt certain generalisations could be made regarding the laws of social change, and that once these had been discovered and understood, then, as in science, the future course of certain events could be forecast within the limits imposed by the possible impact of new ideas. Various references implying such assumptions occur throughout Maine's works, particularly with regard to the growth of law. For example, in discussing the introduction of the Benthamite notion of sanction into Indian Law, he suggested that this minor innovation had necessitated the modification of Hindu Law to a much greater degree than had ever been anticipated. But, he

continued, "No better proof could be given that, though it be improper to employ these terms sovereign, subject, command, obligation, right, sanction, of law in certain stages of human thought, they nevertheless correspond to a stage to which law is steadily tending and which it is sure ultimately to reach."¹⁵ Or again, in his early lecture on Roman Law he maintained, "It is not because our own jurisprudence and that of Rome were once alike that they ought to be studied together - it is because they will be alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity."¹⁶ And later in the same essay, he stressed this point again by claiming that one of the attractions of Roman Law is its power. ". . . of enabling us, by the observation of its own progress, to learn something of the course of development which everybody of legal rules is destined to follow."¹⁷ These examples have been drawn from Maine's reflections on law, but he indicated in his article "Mr. Godkin on Popular Government" that his own belief in inevitability might be extended to cover a wider field.¹⁸ The point which he was making was that societies rested upon factors independent of human nature. This, he believed, certain deductive thinkers, including J.S. Mill, had failed to realize. Societies should be seen as ". . . organisms with a development and laws of their own."¹⁹ Unfortunately, Maine refused to discuss this thesis at any length since it lay beyond his immediate purposes, but it is a concept which seemed to lend

support to the argument that he held some belief in autonomous laws of society.

For the moment, then, it would seem that one could confidently identify Maine's position with that of Harrison and suggest that he believed history to be the key to politics which unlocked the mysteries of the future by presenting an incontrovertible process of change. Political activity was concerned merely to realize the dictates of history. Indeed, our confidence in such a conclusion is heightened when we find Maine stating that, ". . . if not the only function, the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law. . ."²⁰ He continues that, ". . . by the examination and comparison of laws, the most valuable materials are obtained for legal improvement. There is no branch of judicial enquiry more important than this, and none from which I expect that the laws of our country will derive more advantage, when it has thoroughly engrafted itself upon our legal education."²¹ It must be remembered that Maine identified the Comparative with the Historical Method, and so his argument at this point is equally applicable to what has been termed his historical analysis. But, before asserting conclusively that he does belong to the same positivist tradition as Harrison and his colleagues, the negative aspect of the case must be discussed.

In his essay, "The Effects of the Observation of India on Modern European Thought", the Rede Lecture for 1875, Maine rejected the thesis

that, because several property had been found to be of more recent origin than property in common, those agents attacking private property and demanding a return to the natural condition of communism, gained the advantage of historical support on the basis of communism's historical primacy. His position was, and it constitutes the foundation of this particular interpretation: "It is not the business of the scientific historical enquirer to assert good or evil of any particular institution. He deals with its existence and development, not with its expediency."²² For Maine then, scientific history was non-prescriptive in essence, it simply enabled man's knowledge of his present world to become more meaningful. History was valuable because it was "true", "a portion of the truth which it is the object of all study to attain."²³ It provided man with the heritage of his ancestors. Certainly, at this point, he did not feel that history revealed any particular policy lines to be realized in the political sphere. Maine definitely rejected any idea of an elite of social scientists directing society on principles derived from "history" in the manner advocated by Comte and Ernest Renan. Rather, in man's political affairs, Maine favoured the continued dominance of a traditional aristocracy in the performance of what is an 'extremely practical kind of business'. They alone possessed the necessary wisdom - the inherited feeling for the institutions, customs and ethos of a country - an intuitive, rather than rational political knowledge.

The two positions have thus been outlined. On the one hand, Maine seems to assert that history reveals certain paths along which it seems inevitable that all societies must pass. Political action in this case is simply concerned with preparing the ground for the unfolding of a necessary development. On the other hand, it is suggested that history is simply a body of knowledge which could explain, but not prescribe. Political action is creative in its own right. However, although these two approaches may individually form the basis for interpreting Maine's writings, a third approach, and it is suggested a case more representative of his true position, remains to be delineated. It is a position which lies between the two extreme cases which have been outlined above and it can, therefore, best be described by presenting these in their more moderate forms, by moving towards the centre of the continuum.

Taking the positive interpretation of history first, it might be argued that Maine felt no rigid policy directives could be deduced from the past since the laws of development were of a much too general nature to be of any practical benefit. In any case, the political decision whether or not to attempt to guide society along new paths had to be made by using other than historical considerations. History was vital, however, in providing the essential knowledge of the framework within which one was acting; it provided the evidence or material on which

the value-judgements of politics could be made with some degree of confidence. But the actual political decision itself was quite separate from the historical world. It 'existed' in the realm of values; it was concerned with what was considered 'ought to be'.

Politics, for Maine, was continually a response to circumstance; and it was history which gave the fullest account of whatever circumstances existed at any time. But the two worlds of history and politics could not be equated or identified in Maine's schema: though closely integrated, the two disciplines remained logically independent. For Maine, then, continuity with the past was a necessity and not a duty; it was, however, not the blind acquiescence in the here and now or some immutable law of progress. This point might be illustrated from Maine's Village Communities. After insisting that history was not concerned with expediency, Maine continued; "But one conclusion he may properly draw from the facts bearing on the subject before us. Nobody is at liberty to attack several property and to say at the same time that he values civilisation. The history of the two cannot be disentangled."²⁴ Initially, this might appear a rather dubious point to quote in favour of the proposition that Maine believed history offers contemporary man no specific political directives. Indeed, it has been chosen especially because it is a point which, though in itself offering no grounds for such an interpretation, has been misconstrued in this way by certain writers. For

instance, Craine Brinton in his work English Political Thought in the 19th Century ridiculed Maine by claiming "History may not be philosophy teaching by example, but she does not refuse to teach truths convenient for an English gentleman with a dislike for socialism."²⁵ But, if Maine's statement is examined more closely, it can be seen that he was not supporting the political disposition which Brinton obviously thought him to be. He was simply presenting a generalisation regarding the nature of western progressive society. By comparing primitive and modern society, it was clear that modern civilisation was characterised by the phenomenon of the individual and the necessities requisite to his survival, the chief one of which Maine saw as private property. Clearly, if private property were abolished, then an important foundation of individuality would have been destroyed, and the whole character of western society as it then existed would have been changed. It was obvious that Maine felt that politically such a change would be for the worse, since he believed that progress and also happiness are dependent on individualism. But, as a point of fact, his original assertion is politically neutral. He had presented what he considered would be the result of a certain line of action, but whether such action was to be taken was a decision which the scientific historian, qua historian, was not competent to make. Thus there can be no question of Maine's having committed the naturalistic fallacy: he did not attempt to derive political ideology from his 'status

to contract' theory. But because he supported the virtues of a modern contract society politically, commentators have been led to argue that his politics were derived from his historical position. As Smellie said, his historical theory was used as "a text for naive individualism,"²⁶ suggesting that his political ideas had been logically deduced from his historical thesis in the same manner that Marx had derived his. But, such an interpretation of Maine's position has been shown to be quite false: his historical theory and his political sympathies were perfectly compatible, but the latter were not dependent on, or strictly deduced from, the former.

If Maine's historicism is not as thorough going as it might have appeared at first sight, it can also be demonstrated that his faith in a traditional ruling elite does not exclude the utilisation of historical knowledge. It has been argued that this key group in society owes its position to its 'wisdom', its practical knowledge: a knowledge which is based on an intimate familiarity with the customs and traditions of society - a fundamental awareness of the basic cultural heritage. To fully appreciate the character of society, it is essential that some understanding of the development or origin of various practices be grasped. Certainly, this need not be a very profound view of the process of history, but it is an understanding essential to effective political action.

Without it, politics would appear to be based on the kind of *a priori* reasoning advocated by Rousseau, a view which Maine believed ridiculous. For Maine, then, the practice of politics was a limited activity which took place in the light cast by history, although he did not believe either in an irresistible movement of society or in attempting to deduce political maxims from the past.

THE FOUNDATIONS OF MAINE'S POSITION

Having thus established the relationship existing between the political and historical orientations of Maine's work, it will be of some interest to take note of the assumptions upon which the whole rests. By comparing ancient and modern civilisations, Maine had noticed that there had been a fundamental change in the organisation and character of the world: it was the change he described as the movement from status to contract. But what was the nature of this change? How was it related to the idea of progress which dominated 19th century thought? What was its relationship to the concept of evolution, and how did Maine feel about possible future change? To determine the dynamic character of Maine's thought, it is necessary that it be seen in relation to these questions which constituted the major preoccupations of 19th century social theory.

Under the impact of Darwin's Origin of Species in the 1860's, the concept of Progress entered its third stage: by the 'seventies and 'eighties, it had become a general article of faith. Although, as R.G. Collingwood pointed out, the idea of evolution in nature, a certain orderly sequence of change, and the idea of historical process in human history were two distinct ideas, together they underlay the 19th century concept of Progress. To base progress on evolution, Bury suggests that two assumptions must be made: firstly, that 'social life obeys the same general laws of evolution as nature'; and secondly, that 'the process involves an increase in happiness'.²⁷ Both of these assumptions Maine apparently adopted.

The most popular and optimistic interpretation of this theory of Progress was given by Herbert Spencer. For him, progress was not an accident, a matter of lucky chance, it was necessary: "The ultimate development of the ideal man is logically certain - as certain as any conclusion in which we place the most implicit faith; for instance that all men will die."²⁸ The object at this point is not to criticise the various weaknesses in the concept of progress, but simply to indicate the atmosphere of social thought at the time Maine was writing.

Maine, as we shall see, usually restricted his use of the term 'progress' to mean the continual production of new ideas. Neverthe-

less, he seems to have shared in the general belief that man was happier than he was as little as one hundred years ago. Maine made this point expressly in an address to the students of the University of Calcutta in 1866 when he said:

Although there is much in common between the Present and the Past, there is never so much in common as to make life tolerable to men of the Present, if they could step back into the Past. There is no one in this room to whom the life of a hundred years since would not be acute suffering, if it could be lived over again.²⁹

This seems a rather uncharacteristic remark from this normally 'melancholic conservative', who recognised so clearly the relativity of history.* Yet it does seem to be in harmony with his theory of social change. Not only were men happier than their ancestors had been during the childhood of civilisation, they experienced, though many refused to recognise the fact, higher moral standards. The greater volume of legal control in modern society was not a symptom of the depravity and decline of moral standards, it was an exhibition of a greater social awareness. The limited amount of criminal law in Roman society does not suggest that they were governed by a higher morality than our own; "We should rather

* As Maine often cites India as a 'stationary society' this remark might seem contradictory; but he felt that India was changing rapidly under the influence of British rule.

say that, in the interval between their day and ours, morality has advanced from a very rude to a highly refined conception. . ."³⁰

Underlying Maine's understanding of society's gradual improvement in material and moral terms were certain assumptions which must be taken into consideration. Basic to his whole system of thought is the notion that Eastern, stationary societies exhibit ". . . rather the infancy of the human mind prolonged than a different maturity from that familiar to us. . ."³¹ Upon this belief rests the value of his comparative-historical method of social investigation and the notion common in the 19th century, that there has been a single, unilinear process of evolution. Had he not assumed that progressive societies had once been in the condition of existing 'stationary societies', then there would have been little point in examining Hindu society in order to determine the origins of progressive societies. Once any movement was underway, Maine claimed that because of the importance of imitation, all societies would tend to move along the same path. An example of such a process, he would suggest, is the phenomenon of "westernisation", the increasing similitude of the whole world resulting from the breakdown of traditional structures through contact with industrial peoples. If there was any movement in society at all it did appear to be along the status-contract axis. But that there should be such a movement was certainly not inevitable, nor was it guaranteed that once

achieved, the virtues of a contract society could be maintained against the dangers of retrogression. In primitive society, then, all the ideas of the modern world could be examined in their earliest form, their original significance being heightened by the comparative simplicity of ideas in arrested cultures.

Implicit in Maine's theory of social evolution are ideas symptomatic of a certain fundamentalism characteristic of 19th century thought. Indeed, without it, the whole reason for studying ancient society would have been undermined. Certain aspects of this fundamentalism have already been indicated, for example, that ancient concepts are the "germs" out of which all modern ideas have grown, or that there is, if nothing else, a certain order in which the various stages in the growth of modern society must occur. The actual extent of this type of belief in Maine's work must now be examined.

Some assessment of the great role which Maine assigned to ideas in determining events may be gained from the following:

If anybody seriously thinks that a great movement can neither be started nor arrested by a book written by a thinker in his closet, he should study Mr. Bonar's Malthus and his Work.³²

This opinion is maintained throughout Maine's writing. In Ancient Law he isolated certain concepts which he considered to have been absolutely crucial for the development of society. Such was the Greek concept of

'nature' with its notion of simplicity and harmony enabling the Roman's to aim at a particular goal in legal reform and avoid the dangers of being ensnared in religion and superstition. Others were the ideas of contract and testamentary succession, ideas which Maine regarded as essential for the release of the individual from the bondage of the Patriarchal Family. Failure to achieve this in the East contributed to its stationary character. Following in the train of these principles was the adaptation and adjustment of legal, political and social institutions, but it was thought which was the pathfinder to the new world of greater individuality and progress. Clearly this is a fundamentalist theme: it distinguishes between major and minor causation and insists that the above ideas were decisive in determining the nature of the contemporary world. In this modern world Maine perceived that progress was intimately connected with a number of considerations. These were the interrelated ideas of individualism, private property and contract. Regarding contract Maine felt that, ". . . all the modern progress of society seemed to be intimately connected with the completest freedom of contract, and in some way almost mysteriously dependent on it. . . ." ³³

Given then the particular ideas which Maine found to have been of such great importance in the modern world, contract, private property, etc., it is hardly surprising that, even allowing for the fact that his politics

were not logically deduced from his wider social generalisations, these views should have been reflected in his political opinions.

Now in the same way in which it was found useful to compare the framework of Maine's historical method with those of his contemporaries, so it will be of some value to see the assumptions underlying this approach in relation to those of other systems. The bases of 19th century social theory might be seen as exhibiting a number of mythologies, and although these were of a multifarious nature, in essence they can perhaps be reduced to three main types. The first and most widespread was the myth that man was subject to historical laws of development which he could not control - that an unseen hand controlled the destiny of mankind. The second, which was of great importance in English thought, was the opinion that man himself was in a sense divine. He could determine the character of society; he alone was responsible for the great technological civilisation and had perfectability within his grasp. Finally, there was the concept that man was neither God nor automaton, but a creature capable of greatness or self-destruction.

The first of these ideas has been discussed in Werner Stark's book Social Theory and Christian Thought : A Study of Some Points of Contact where he demonstrated that certain of the assumptions underlying 19th century social theory held implications which the social

prophets had failed to realize. He held that the association of social theory with myth or religion was first developed by St. Augustine, who insisted that everything in the universe had its divinely ordained station and function - that even evil had a specific purpose in God's Divine Plan. Stark continued that, "It is a far cry from these sentiments, characterised as they are by the deepest faith in a personal God. . . to such deistical or atheistical writers as Adam Smith and Kant, or Hegel and Marx. Nevertheless, the structure of their thought is very close, not to say identical with, that of Augustine. All four, together with the whole host of their followers, were convinced that there operates in history and society a hidden law which co-ordinates and combines the disjointed and selfish actions of individuals into a great social order or process which achieves other, and indeed, better, in the sense of more moral, effects than they have ever contemplated or desired. The theological meaning has dropped out, but the doctrine of the 'heterogony of purposes' has remained - remained at the very heart of sociological thinking. . ."34 In each of the positions adopted by this group of thinkers, the basic idea was that despite all the selfish attitudes of individual man, the movement in society would always be towards a position of social integration, whether this meant the increasing social benefits of laissez-faire capitalist society or the classless state prophesized by Marx. The world was governed by an unknown force, a Will which realized its pur-

poses, through, or in spite of, the conflicting wills of the members of society. None of these writers acknowledged this mythical character of their thought; often they were violent critics of the dramatised version of the human condition provided by Christianity. But whether they called the superhuman force which governed events history, science, or a world spirit, that force, in all its essential aspects, may be identified with Augustine's Will of God, with the concept of the 'heterogony of purposes'. Even Darwinianism, usually regarded as the great opponent of metaphysical assumption, actually helped to establish this "sub-theological" tradition more firmly than ever in the social sciences. The theory of Natural Selection in itself, according to Wundt, could not account for the useful variations which developed in various species. The possibilities of sufficient numbers achieving the same variations and being able to establish and propagate itself were infinitesimal. To account for variations, therefore, Wundt fell back on "will" and the idea that the subjective will issues in objective consequences which correspond, not to the wills which initiated them, but to a purpose beyond them. It was thus a restatement of the heterogony of purposes. This can perhaps be considered the major myth of the 19th century, but the alternatives held their attractions for others.

The second myth is in many respects similar to the teleological myth discussed above. In it the notion of a transcendental power is replaced by a human agency. The power to change the world is the power of human knowledge, particularly scientific knowledge. This is the belief which underlay the great radical movements of the modern world. Beginning in the Enlightenment philosophies of the 18th century, the belief was conveyed to the 19th century by the utilitarians within their schema based on the principle of the Greatest Happiness of the Greatest Number. It was passed on to the 20th century by the Fabian Socialists through their trust in the power of organised administration. There was no need to wait for some unseen hand to create the new millennium, man had the knowledge and skill with which to build it, step by step, here and now.

Now where does Maine stand in respect of these two traditions? The fact that he rarely mentioned Christian thought in his work, or that his religious convictions were not sufficiently powerful to enable him to secure a fellowship at Trinity in 1845 by taking Holy Orders, are really of little use in assessing the assumptions which formed the basis of his theories. It would seem, however, that his confidence in the efficacy of private property and the freedom of the individual in producing progress indicates some leanings towards Augustinianism. Indeed, his sympathies with Adam Smith appear to have been of some import. With him, Maine would

certainly agree that man is essentially a contract-making animal, and that through the selfishness of economic competition, a form of natural selection, men increased the social benefit, or as Spencer cared to put it, differentiation goes hand in hand with integration. Like all the classical economists, Maine was ready to lend support to the thesis that the initiative of the individual was the springboard of all progress. It is also true that, like so many 19th century social thinkers, he had indicated that he believed society was to some extent governed by laws which were in some way independent of the activities of individuals within society. This implies that he saw the great law of evolution as in some way independent of man's conscious design, a position which would tie in with the concept of some external force determining events. Maine, it has been suggested, did not see fit to develop this point and consequently, it is difficult to draw any rigid conclusion. Certainly the rest of his work fails to reveal any great sympathies with this particular strand of mythology. He was of a much less optimistic disposition than either Spencer or Smith. He could not see any evidence which seemed to support a grand design thesis, and this alone one would imagine is sufficient to dissociate him from the band of Augustinians. But failure to qualify as a participant in this sub-theological tradition does not necessarily entail any guaranteed fellowship with his more 'profane' contemporaries. In fact, it was against this tradition of thought particularly and its ex-

treme utilitarian manifestations that Maine had directed a life-long attack. Their faith in a particular organisation of society applicable anywhere and at anytime was an anathema to Maine. The crude and clumsy instruments of reform advocated by these thinkers were totally inappropriate, being the product of a grossly simplified view of the real nature of social change. The fundamental error involved in this particular myth was the substitution of technical knowledge for the historical understanding of society. Society was not a static organisation, but a living thing - the product of a history from which it could not be separated. To dismiss the past as a record of human failure, as Rousseau and the utilitarians had done, was to remove the root of present society from its source of life.

The two myths have underpinned the various alternative teachings which have been contrasted with Maine's position in history and politics throughout this essay. They are, however, but two, albeit major ones, of many themes interwoven with 19th century political thought. Maine's own mythological inspiration is primarily Greek, to be more exact, Aristotelian. Aristotle contended that although man was not the mere plaything of a transcendental deity, neither was he capable of coherent action without taking cognizance of the circumstances in which he found himself. In a world of change, it is the task of the statesman to secure ordered development by cultivating the inner potential of favourable

circumstance. In this process, careless husbandry would blind men to dangers, and lead them to imprudent adventures. Maine's position is clearly very similar to this. He would seem to belong to the Greek tradition of considering man almost semi-divine in his greatest achievements, but at one with the lowest creatures in his subjection to the fundamental laws of nature. R. Huyghe gave expression to this particular myth when he said, ". . . They all suffer from man's duality; man hanging torn, between two poles: one is still in contact with the beast, the other already reaching up to God. This is man's unsolvable paradox."³⁵ In politics, in particular, the restrictions imposed by the material with which one must work are most apparent. Man must be a craftsman if he is to succeed in realizing the good society.

CONTEMPORARY INTERPRETATIONS OF MAINE'S THOUGHT

Modern interpretations of Maine's system of thought now recognise the close connection between his historical and political studies, but the exact nature of the association is still a matter of contention. On the one hand are interpretations like those of Brian Smith and K.B. Smellie, who regard Popular Government as a caricature of Ancient Law. They see both as essentially concerned to show the uniqueness of civilisation and to give warning of the threat to it from the advocates of

irresponsible à priori doctrines. On the other hand is the analysis offered by G.A. Feaver, who, using new materials - anonymous review articles which have recently come to light - suggests that although Ancient Law and Popular Government are connected, the latter is more a reaction to, than an implementation of, the themes expressed in the former.

B.C. Smith in his article, "Maine's Concept of Progress", develops the idea that Maine thought that freedom of contract, several property and individuality were not simply manifestations of civilisation, but constituted its very basis. At one point, Smith commits the fallacy of identity* suggesting that Maine "defines civilisation in terms of several property. . .,"³⁶ when he was simply claiming that several property had been the most powerful of a 'vast variety of solvent influences' in creating modern civilisation. Smith continues:

An analysis of the defence of contract and private property, together with some consideration of Maine's definition of intellectual progress, facilitate an understanding of the motive behind Popular Government.³⁷

* See "The Proof of Utility in Bentham and Mill"; E.W. Hall; Ethics, 1949-50 for a discussion of this fallacy. But a very crude example to indicate the idea would be to say smoke is fire, when, in fact, they simply occur at the same time.

This argues that Maine was defending the virtues of 19th century liberalism, or to be more precise, the "Old Liberal" view of politics, a position which moved increasingly to the right in defiance of the threat of democratic mediocrity. It was a more masculine liberalism than that expounded by J.S. Mill, and claiming such scholars as Fitzjames Stephen, Maine and Sidgwick, found its most able representative in the Commons in the figure of Robert Lowe.:

Feaver, however, argues that such a laissez-faire interpretation of Maine's work is unsatisfactory. Even allowing that past progress had resulted from the release of the individual from ascriptive legal ties, he continues:

It by no means follows that Maine would welcome the uncontrolled continuation of that process. What was to concern Maine in his mature political studies was the explicit recognition of (indeed, alarm at) what he had implied elsewhere in his volume on "Ancient Law". Along with the general tendency towards the removal of formalized legal restraints (status), he surmized, went an increased degree of social and political freedom to, a freedom he hinted most people were incapable of handling.³⁸

Feaver maintains that, even in Ancient Law, Maine had recognised the dangers of his social theory and had suggested that ". . . 'the movement of progressive societies has hitherto been a movement of status to contract' (underline added),"³⁹ the inference being that Maine thought that this process had gone quite far enough already. The political implication, Feaver argues, was that Maine did not consider the mass of society capable

of meeting all the demands of legal freedom, and that the creative aristocracy which had previously been free from mob control would be ". . . sacrificed before the altar of levelling democracy."⁴⁰ Furthermore, following on the achievement of political power by the masses we might expect that there would be a new demand for order. The 'anti-individual' would bring about a new era of totalitarian barbarity; a new period of status in which the individual was submerged. Attempting to find support for this thesis in Maine's journalistic writings, Feaver claims that,

A cursory reading of Maine's political writings leave no doubt that he feared any democratizing repercussions from the continued removal of traditional legal restraints. Progress consisted rather in a fine balance, a partnership in society which joined the rational few capable of legal freedom* and those less fortunate who needed traditional authority.⁴¹

Maine's faith in future progress, then, on Feaver's interpretation, depended on the continued freedom of the creative elite and the legal bondage of the masses. The whole movement of historical development had to be stopped by political action if civilisation was to be preserved.

The basic difference between the two interpretations seems to be that Feaver thought that the previously beneficial process of breaking down ascriptive ties had been continued as far as possible, and that to pursue such activities further would simply destroy the character of modern civilisation. Smith, on the other hand, felt that Maine was advocating

* my italics

an essentially laissez-faire society, attempting to preserve the legal and political rights extant in the 1860's whilst blocking further reform since this would lead to socialism. Thus we have a contrast between Maine's work seen as expressing a liberal doctrine and seen as a defence of a traditional society. In both cases, the outcome is an interpretation of Maine's historical and political activity in terms of a reaction, showing him as attempting to preserve a particular order in society.

There is much to be said in favour of both these positions despite the inadequacies of the summaries presented here. But there seems to be a number of shortcomings in each which, when made good, lead to a third position. Agreeing with Smith, it may be affirmed that Maine was vitally aware of the great importance of the freedom of the individual as the source of progress. Even so, it would be quite wrong to suggest that the status to contract theory was in any way a political doctrine. It was not. It was concerned purely with the history of legal relationships. Despite Maine's own careful warning about extending the competence of his historical thesis, many writers, including both Smith and Feaver, have fallen into the error of applying it to the political and economic spheres. As G. Sawyer remarked in Law in Society, most of the criticisms of the status to contract thesis have been inappropriate because Maine and his critics were talking about different things. It is irrelevant to talk about trade unions restricting freedom of contract

and so on, when, "It was the wide extension of full legal capacity to sane adults which Maine emphasized, and in this he was quite correct."⁴² As it has been demonstrated above, Maine did think that freedom and individuality were vital factors in progress, but his defence of these positions has nothing to do with his status to contract theory. His political views were not determined by his historical investigations. He simply said that a comparison of ancient and modern society showed that the modern world exhibited a highly complex legal structure based not on the family but on the individual. This is the quintessence of his thesis. However, along with this change had occurred corresponding changes in the nature of ownership, the relationship of man with his fellows, the character of exchange and so on. Private property, for example, was one of the results of this change in society, but Maine did not claim that he had found any law which suggested that private property must be preserved, or that it was merely a stage in the development of communal ownership. He simply observed its growth as a historical fact and noted its important role in the nature of contemporary society. To accept the status to contract thesis, even if one extended its meaning beyond the limits of pure legality, as a political doctrine demonstrating the 'historical inevitability' of laissez-faire, as Smith urges us to do, would be to completely misunderstand the nature of Maine's work.

It would seem, then, that if Smith erred in over-emphasizing the liberal aspect of Maine's work, Feaver gave too great an importance to certain reservations which Maine felt regarding the freedom of the individual. By attempting to construct a picture of Maine's personality as that of a "dogmatic authoritarian", he seems to have distorted the message which Maine presented to the 19th century. In his analysis of Maine's work, Feaver does not draw any distinction between legal and political rights. It is true that political rights are legally enforceable, and as such, in a general discussion might be classified under the wider label of legal rights. But in more specialized analysis, political rights must be distinguished from their near relations. Political rights are those which enable a man to participate in the political or public arena. In contrast to this, legal rights refer to every form of private relationship into which man can enter with his fellows and which will be enforced by the sovereign authority. Given this distinction, Feaver's position is totally undermined. To maintain that Maine considered the movement from status to contract to have reached its limits and that the further breakdown of traditional legal restraints would endanger society, is completely erroneous. Nowhere in his academic work does Maine assert any such claim, and certainly Feaver has not produced any evidence from Maine's journalistic writings or correspondence with which to support this view. Rather, Maine saw the continual removal of unnecessary legal

restraints as the only means of attaining a rational system of social relationships. The movement towards greater freedom under law lay at the very basis of progress and, consequently, must not be frustrated by reactionaries or by revolutionaries. It was not the breakdown of certain legal barriers which disturbed Maine. What he was worried by was the removal of a political barrier. The enfranchisement of the masses appeared as a retrogressive step to him because, as we have seen, he believed that their ignorance of the art of politics could have disastrous consequences. Feaver's mistake, then, is in extending Maine's fears regarding political rights to cover every legal right, of magnifying one apprehension - the fear of universal suffrage - to the extent that it overwhelms his whole theory of society's development.

Leading on from this point is a second: in stressing the importance of a creative elite, Feaver seems to confuse the distinction between a political elite and a creative minority. He speaks about a "creative aristocracy who had been free from the restraints of the vulgar,"⁴³ and of Progress as "a partnership in society which joined the rational few capable of legal freedom"* and those less fortunate who needed traditional authority."⁴⁴ This obscures the point which Maine was making. Maine did not suggest that the political aristocracy was in any sense more intelligent or creative than any other members of society. He defended a ruling class because its members alone knew the character of politics.

* my italics

They alone could guarantee the freedom without which the creative minority in whichever class of society they found themselves could not continue their work. Maine feared that to grant universal suffrage would simply be the first step in the direction of the totalitarian state wherein the freedom and legal rights of all men would be crushed. As we have seen, Maine agreed with Oakeshott that the conditions of freedom had been gained in the early 19th century. Men were free if not equal. In his defence of the aristocracy, then, Maine was not defending the rights of a particular class, he was attempting to protect the rights of all men. His opposition to direct democracy did not involve a rejection of his faith in individualism, it was an attempt to enable its expansion to continue unhindered. As a final point, it must be remembered that although Maine had resisted universal suffrage in his journalistic writings, in Popular Government, like the true conservative that he was, he accepted it as a fait accompli. It was quite wrong for Feaver to argue at this point that: "For Maine reconciliation is no longer possible. . ."45 Maine did accept the new situation. Thereafter, he concentrated on emphasizing the vital role which the aristocracy could play in checking the dangers inherent in it.

CRITICISM OF MAINE'S METHOD OF ANALYSIS

The point has now been reached where an indication of the major criticisms levelled against Maine's work as a whole will be of

value in making a final assessment of his achievements. One of Maine's major axioms was that Eastern societies exhibited the characteristics of the Aryan race in its childhood. Consequently, such material that existed in these areas was invaluable in understanding the character of the early stages of progressive civilisations. This assumption has now been challenged. Karl Jaspers, for example, claims that the stability which the East exhibited in the 18th century occurred because India and China ". . . had both reached an advanced stage in their downward path."⁴⁶ Until the 17th century, these civilisations, both of which had achieved the breakthrough of the axial period, had flourished and developed. Here then, were no lessons to be drawn about the origins of western civilisation. Eastern society should be seen as the ". . . great symbol of what may happen to the whole of mankind. . .,"⁴⁷ and not as a living past.

Further objections might also be made in respect of Maine's study of ancient societies. He did not define his understanding of a stationary society very clearly, and even had he done so, and it had been accepted as reasonable, it might still have been objected that this study was still of no consequence in explaining the nature of the modern world. Well might we ask 'of what significance is the fact that western society has evolved in a different way from that of the East?' Rather than asserting that eastern societies were of a stationary and unhappy character, as Maine does, it could be argued, with equal plausibility, that these areas

had achieved a happy stability which had eluded the west. Their durability could signify a condition of tranquil contentment and cultural maturity. Maine gives no specific reason why eastern societies should be considered as immature compared with those of the west, rather than as exhibiting a different development. But without this assumption, his concept of unilinear historical development would be undermined. Certainly a more detailed defence of such a fundamental point might have been anticipated.

But even if these objections can be met, Maine, in his attempt to establish a ". . . continuous and uninterrupted line of development, . . . a unilinear direction of movement . . ." ⁴⁸ In history, has a still more rigorous critic to answer. A major attack on his style of thinking appears to have been delivered by Professor Oakeshott in Experience and Its Modes. Oakeshott specifically rejects the view which asserts that ". . . in order to understand things we must understand their history, and that when we have understood their history we have understood the things themselves." ⁴⁹ This clearly affects Maine's opinion that an understanding of the past is instrumental in understanding the present, even though he did not consider it to provide a complete explanation.

The separation of modes of thought is the purpose behind Oakeshott's work. History is treated simply as one of the exclusive abstract worlds which attempted to give a coherent account of all experience from

one point of view. It is distinct from other modes of thought - science, poetry, philosophy and practice - and can have no dialogue with them. Ideas in history are accepted or believed to be true or false within the historical world alone. This is a world which exists in the present, but one which is subsumed under the category of the past. It is a contemporary mind in a particular pose, a pose which understands temporal relationships not in terms of cause and effect, but of contingency.

Such a concept of history clearly casts a shadow over Maine's position as a whole. Not only must his attempt to relate past and present be seen as misdirected, but his attempt to base history on scientific techniques must also appear as misplaced. Oakeshott's denial of the validity of laws in history undermines the most important methodological aspects of Maine's work. Although the comparative method has been widely employed in social anthropology, of which Maine was one of the founders, according to Oakeshott:

The Comparative Method is not a method which unites science and history; it dismisses history and never achieves the full condition of science. And since the scientific character of anthropology is an illusion, its concepts and presuppositions being those of history, we must conclude that it is history or nothing.⁵⁰

It would seem from this that Maine's work rested upon contradictory and insecure foundations. On the one hand, he claimed that he wanted to make history scientific and arrive at comprehensive generalisations; whilst on the other, he felt that an appreciation of the past

is important to a scientific understanding of the present. In effect, he seems to have committed all the errors which Oakeshott has since warned against. However, we will have been misled if we believe that Maine's manifesto on historical method determined the character of his own historical writing. His assertions regarding the scientific nature of history in his addresses to the University of Calcutta seem to have had little impact on his own work beyond inspiring the general direction of his interests. One feels that Professor Vinogradoff makes rather too much of Maine's 'scientism', particularly when he attempts to relate him to the more ambitious doctrines of the positivist school.⁵¹ Maine can be considered as having failed to achieve a scientific status for history - even his professed attempts to base his generalisations on empirical evidence came to nothing. As A.S. Diamond said:

. . . the early chapters of "Ancient Law" - that part of his work which, measured by its scope and influence, must be considered to be by far the most important - consists mainly of nothing more than courageous conjectures.⁵²

But Oakeshott's position must not be misconstrued at Maine's expense. Oakeshott's rejection of any relationship between past and present is not as absolute as some of his assertions would seem to suggest. Since all experience, and this necessarily includes historical experience, exists in the present, then, the world of the here and now can be seen from the

stand-point of history. Once this is done, the present, as something distinct and separate from the past, disappears. The 'present' simply becomes the last frame in the reel of history, and so, to gain some insight into what is happening at the end, it would surely seem helpful to return to the beginning and see the film as a whole. It is true that this would only help explain the 'present' from a particular point of view. One would be familiar with the origins of a specific set of circumstances and this would not enable one to determine what was going to happen next. Neither could it be said to produce any scientific explanation of events, even less to give directions as to what ought to be done about them. But to be familiar with the development of a situation is not without significance in understanding the latest position. If this is a reasonable interpretation of Oakeshott's work, then, far from being a critic of Maine's position, he turns out to be in sympathy with it. Witness, for example, Oakeshott's use of "historical description" in his essay on "The Masses in Representative Democracy". As he says regarding the impact of the mass man:

I think we should recognize what our true position is in this respect, what precisely we owe to this character, and the extent of his impact, if we understood more clearly who this "mass man" is and where he has come from.* And with a view to answering these questions, I propose to engage in a piece of historical description.* . . . You must bear with me while I set the scene for the entry of the character we are to study, because we shall mistake him unless we prepare ourselves for his appearance.⁵³

What Oakeshott was really denying was, not the possibility of understanding the 'present' as part of the historical universe, but the linking together

* my italics

of the historical and practical worlds. This is quite a separate proposition, since the world of practice is not in being, it is in process of becoming and, consequently, it is beyond the reach of history. It is experience seen from the view of what ought to be and will be, and not from the point of view of the past.

The outcome of this analysis, then, would seem to be that, provided one does not seek to explain the whole of the present in terms of history or to use history to support political doctrines and policies - none of which Maine himself attempted to do - then there is still value in his style of historical analysis, both as a purely academic study and as a means of providing the essential background for political action.

REFERENCES

HISTORY AND POLITICS

Chapter Five : References

<u>Page</u>	<u>Ref. No.</u>	<u>References</u>
167	1	Quoted in <u>The Origin and Goal of History</u> ; Karl Jaspers; p. xiv.
168	2	<u>Ancient Law</u> ; With Introduction and Notes by Sir Frederick Pollock; Sir Henry Maine. p. xvii.
169	3	Jaspers; <u>op.cit.</u> , P. 28-29.
170	4	<u>Popular Government</u> ; Sir Henry Maine; p. 143.
171	5	Jaspers; <u>op.cit.</u> , p. 1.
172	6	<u>Early History of Institutions</u> ; Sir Henry Maine; p. 346.
172	7	'Sir Henry James Sumner Maine 1882-1888'; Sir Frederick Pollock, <u>Encyclopedia Britannica</u> ; London, 1902; p. 477.
174	8	'Evolution in Anthropology'; I. Goldman; <u>Victorian Studies</u> , 3, 1959-60; p. 56.
175	9	See <u>Aspects of History</u> ; E.E. Kellett; p. 108.
175	10	<u>The Meaning of History</u> ; Frederic. Harrison; p. 6.
176	11	<u>ibid.</u> , p. 6.
176	12	<u>ibid.</u> , p. 19.
176	13	<u>ibid.</u> , p. 7.
176	14	<u>The Development of European Polity</u> ; H. Sidgwick; p. 4.
178	15	<u>Village Communities</u> ; Sir Henry Maine; p. 69.

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<u>page</u>	<u>ref. no.</u>	<u>references</u>
178	16	<u>ibid.</u> , p. 332.
178	17	<u>ibid.</u> , p. 376.
178	18	See 'Mr. Godkin on Popular Government'; Sir Henry Maine; <u>Nineteenth Century</u> , March, 1886.
178	19	<u>ibid.</u> , p. 369.
179	20	<u>Village Communities</u> ; p. 4.
179	21	<u>ibid.</u> , p. 5.
180	22	<u>ibid.</u> , p. 230.
180	23	<u>ibid.</u> , p. 264.
182	24	<u>ibid.</u> , p. 230.
183	25	<u>English Political Thought in the 19th Century</u> ; Crane Brinton; p. 271.
184	26	See "Sir Henry Maine"; K.B. Smellie; <u>Economica</u> , March, 1928; p. 74.
186	27	<u>The Idea of Progress</u> ; J.B. Bury; p. 336.
186	28	Quoted in Bury; <u>ibid.</u> , p. 338.
187	29	<u>Village Communities</u> ; p. 289.
188	30	<u>Ancient Law</u> ; p. 181.
188	31	<u>Early History of Institutions</u> ; p. 226.
189	32	'Mr. Godkin on Popular Government'; p. 374.
190	33	<u>Sir Henry Maine: A Brief Memoir</u> ; Sir M.E.G. Duff; p. 90.

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192	34	<u>Social Theory and Christian Thought: A Study of Some Points of Contact</u> ; W. Stark; p. 28.
197	35	<u>Van Gogh</u> ; R. Huyghe; p. 7.
198	36	'Maine's Theory of Progress'; B.C. Smith; <u>Journal of the History of Ideas</u> ; 1963; p. 409.
198	37	<u>ibid.</u> , p. 410.
199	38	'The Political Attitudes of Sir Henry Maine: Conscience of a 19th Century Conservative'; G.A. Feaver; <u>Journal of Politics</u> ; 1965; p. 296.
199	39	<u>ibid.</u> , p. 296.
200	40	<u>ibid.</u> , p. 298.
200	41	<u>ibid.</u> , p. 300.
202	42	<u>Law in Society</u> ; G. Sawyer; p. 66.
204	43	Feaver; <u>op.cit.</u> , p. 298.
204	44	<u>ibid.</u> , p. 300.
205	45	<u>ibid.</u> , p. 310.
206	46	Jaspers; <u>op.cit.</u> , p. 53.
206	47	<u>ibid.</u> , p. 53.
207	48	<u>Sociology of Law</u> ; G.D. Gurvitch; p. 74.
207	49	<u>Experience and Its Modes</u> ; M.J. Oakeshott; p. 149.
208	50	<u>ibid.</u> , p. 167.

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209	51	'The Teaching of Sir Henry Maine'; P. Vinogradoff; <u>Collected Works</u> , vol. II; p. 183.
209	52	<u>Primitive Law</u> ; A.S. Diamond; p. 2.
210	53	'The Masses in Representative Democracy'; M.J. Oakeshott; in <u>Freedom and Serfdom</u> ; p. 151.

CHAPTER SIX

CHAPTER SIX

CONCLUSION

CHARACTER OF MAINE'S WRITING

The character of Maine's work has been revealed as essentially one of moderation. He sought the security of the middle way, the avoidance of extreme positions in any serious discourse. All statements and generalisations, he believed, must be weighed and tested by the evidence before being accepted as in any sense true. The more polemical statements made in his journalistic writings do not deny this interpretation. They were made in political debate, not in political philosophy. It was propaganda, proselytisms designed to sway opinion in a particular direction: it made no attempt to deal with any topic in a thoroughly objective or exhaustive manner. It would be inadvisable, then, to rest too much weight on these review articles in any assessment of the fundamental character of Maine's position.

Permeating the whole of his thought was an acute historical sense; questions could only be answered fully when seen in the perspective of history. This was not, it has been suggested, a crude historicism, but a vital awareness of the importance of history in providing the context for

any discussion. Often evidence from the past demonstrated serious limitations to so-called universal theories in both jurisprudence and politics. Awareness of the importance of historical setting is thus a fundamental aspect of Maine's style of investigation. On whatever question he was engaged, whether it was the nature of contemporary politics, the character of sovereignty, or the assumptions underlying modern International Law, he drew on his great knowledge of the past to bring a new clarity to the issues at stake.

The two major forces giving direction to Maine's inquiries were those of Natural Law and Benthamism. He believed each had proved inadequate as a system of jurisprudence or as the basis of a meaningful approach to political activity. It has been indicated that whilst there was no necessary conflict between the rationalist mode of analysis adopted by the analytical jurists and the historical method, Maine clashed violently with the various pretensions of the Natural Law school.

The subjects dealt with by Maine and the analytical jurists rarely coincided. Even where there was a common topic of discussion, their pur-

poses remained quite distinct. The rationalists were concerned with understanding the logical presuppositions of various institutions; Maine with their historical antecedents. Frequently, however, evidence which the historical inquiries revealed seriously undermined the authority of the analytical theories of social institutions. History provided material which had to be taken into account if a comprehensive, all embracing explanation was to be achieved.

A particularly illuminating illustration of the impact of historical studies occurs in Maine's examination of the concept of sovereignty. He began the discussion by carefully restating the classic definition of John Austin that if "he be determinate human superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, including the superior, is a society political and independent."¹ Maine then proceeded to subject it to historical observation, for as he said:

The duty of enquiring if not how Sovereignty arose, at all events through what stages it has passed, is in my judgement indispensable. It is only thus that we can assure ourselves in what degree the results of the Austinian analysis tally with facts.²

The theory of sovereignty, like any other theory, must be tested by setting it against all the available evidence it was purporting to explain. In this case, the observation of early social organisation failed to reveal

any individual or group of individuals, which could be identified as the sovereign authority. Laws were based on customary usage, not the legislative action of an all powerful body. The orders of even the most absolute ruler were not laws in the Austinian sense, they were at the most single commands, devoid of the generality of true law; and despite any implied sanction, law was obeyed by virtue of habit, tradition and veneration. In fact, Maine believed that the emergence of a sovereign society was a modern phenomenon, coming into being at the time of the Renaissance. With regard to Austinian sovereignty, then, history demonstrated that ". . . the assertion which we are considering would not so much be shown to be false as only verbally true, and therefore without the value which it possesses in society of the type to which our own belongs."³

The limited applicability which Maine believed the Austinian theory of sovereignty displayed, resulted from the nature of the generalisation. Like all scientific or philosophical explanations, it was secured by the process of abstraction, by pruning away all material of a non-essential character. This Maine recognised as a legitimate procedure, but he still maintained that the ultimate value of the theory was dependent on the significance of those considerations which had been excluded as irrelevant. By concentrating exclusively on force as the basis of law, Austin had neglected the history of the community, and yet it was the past alone which determined where sovereignty should lie and how it should be exercised.

Although history could not call into question the internal consistency of the theory of sovereignty, it did call into question its application as an all embracing explanation.

If Maine's discussion of the concept of sovereignty revealed a greater divergency from the Austinian position than was at first apparent, his discourse on International Law demonstrated a greater sympathy with the doctrine of Natural Law. In approaching the problems of modern International Law, Maine perceived that there was a fundamental division over the question of its binding nature. On one side were those who believed that international relations could only be governed by positive institutions based either on customary usage or some form of tacit or formal consent. Beyond these recognised and approved systems of communication, a condition of anarchy prevailed. On the other side were those who believed that nation states, as autonomous sovereign bodies, could be regarded as moral agents and as such were subjected solely to the obligations of Natural Law. Positive institutions, in such an understanding of international relations, appeared to be superfluous. In a typical moderate fashion, Maine insisted that neither of these extreme views should be accepted; rather a compromise position offered a more satisfactory explanation of the situation. It was undeniable that the most practical aspects of International Law lay with the system of positive institutions, but Maine considered that these arrangements could not be separated from the

realms of natural justice. Much of their force and dignity derived from the rule of right reason: from some view of the nature and constitution of man, and the concept of a divine authority which constituted the basis of Natural Law morality. There was a natural and a positive Law of Nations: the attempt to separate public law and ethics was a mistake. Where there was an absence of formal rules of law in any field, then decisions must be reached on the basis of the eternally binding precepts of Natural Law.

By reconciling these two divergent points of view within the system of International Law, Maine was able to dismiss the attacks made on the whole system by the analytical jurists. He claimed that it was meaningless to deny the validity of these legal arrangements, simply because of the absence of any sanction which could be brought to bear. International Law had created not a sanction but a law-abiding sentiment based on the strong approval of a certain body of rules of conduct. It was law founded on right order, a concept of law which had preceded the idea of law as a general command backed by force. To deny the existence of International Law was fraught with danger; anarchy among the nations would sanction the unrestrained rule of the strong to a far greater degree than was already the case. Might would be the only measure of right.

In this discussion, then, Maine can be seen in conflict with the analytical lawyers. But more significant is his sympathy with what has

previously appeared as his *bête noire* - the doctrine of Natural Law. It should be noted, however, that the interpretation of Natural Law adopted as the basis of international relations is fundamentally that employed by the Romans and bears little relation to the ideological system of Rousseau. His defence of the extant system of the Law of Nations can, in fact, be seen as a further facet of his essential conservatism. He accepted the existing structure of communications and attempted to work for improvements within its framework. At the same time, he was concerned to defend the system against ill-considered attacks based on abstract principles. In national politics, the ideological dogmas of Rousseau's interpretation of Natural Law threatened the existing social fabric: in the international field, the danger lay in the rigid application of the Benthamite concept of sovereignty. The roles played by Natural Law and Benthamism were thus reversed in the two situations, but Maine's position remained constant. He was determined to use all his energies to prevent the destruction of civilization either by the inauguration of national or international anarchy. Only by a cautious, reasoned response to changing conditions could the virtues of a progressive world be retained. Rigid, ideological principles had no place in a changing environment: politics was a process of feeling one's way, of testing every step before it was taken. Maine's disposition was thus the same in both the national and international political arenas.

ASSESSMENT OF MAINE'S WORK

Having established the outstanding characteristic of Maine's work as being one of moderation, it will now be appropriate to assess its value - and in particular the value of his political speculations. Maine was one of the last great savants. He was a pioneer in a wide variety of subjects, and so it is hardly surprising that great strides have been made in these fields since he made his inquiries. Specialization is the most outstanding feature of modern knowledge and this has produced material and developed techniques of analysis which have superceded those of Maine. But as Kirk said, ". . . modern legal thought and sociology and political speculation, as well as historical method, are indebted to Maine. In this or that he has been corrected or amended; Maine himself expected nothing else; but the bulk of his writings looms still majestic in accuracy and outlook."⁴ Certainly the historical and comparative methods have proved invaluable methodological tools of analysis. And, in an age in which man weilds such total power, Maine's basic approach to political activity can be seen to retain a vital relevance.

Many of the predictions which Maine made regarding the structure of modern society have been realized. His social analysis reveals an almost prophetic quality. The full extension of the franchise to universal adult suffrage has been achieved, though as yet, in this country at least, without the disastrous consequences which Maine expected to accompany it, were his warnings ignored.

There has, however, with the growth of the mass party system in response to the enlarged electorate, been a corresponding decline in both the power of the individual Member of Parliament and the House of Lords. Power now seems to lie in the hierarchy of the party machine, the Cabinet, or, as some have argued, in the hands of the Prime Minister himself. This is not to suggest that the pattern of modern British politics is characterised by the 'wire-puller' or the 'secret and all powerful Committee of Public Safety', only that there has been a significant centralisation of political power since the beginning of the Victorian era. It was against the danger of 'absolute corruption', implicit in such highly concentrated power, that the Victorian critics of society had set their lances.

It is within the European political theatre, however, that Maine's forebodings regarding the inherent weaknesses of popular government have been most fully realized. His recognition of the basic incompatibility of democracy and nationalism, and his forecast that "nationalism is full of the seeds of future civil convulsion"⁵ appear as perspicacious observations in the aftermath of two World Wars, and the dictatorial nationalism which has been a feature of 20th century politics. European totalitarian regimes, together with their African and Asian counterparts, have engaged in many of the practices which Maine had indicated as essential features of irresponsible elite domination. The form of democratic government has been used to legitimize the rule of the autocrat, whilst in practice, most fundamental

human rights have been suspended and replaced by the rule of censorship and the secret police.

To appreciate why, in relation to Maine's work, such regimes were not produced in England, it is necessary to examine his analysis of democratic tendencies and the various recommendations which he made to prevent any undesirable developments. As B.E. Lippincott has pointed out, Maine's object in studying contemporary experiments in democracy was not to criticise 'democratic philosophy' but to weigh 'democratic beliefs' against the various attempts which had been made to realize these values in practice.⁶ Again, it was Maine's aim to demonstrate the inappropriateness of a set of beliefs rather than their logical inconsistency.

Using the comparative method of analysis, Maine attempted to display the fragile nature of popular government. The examination suggested that unless there was a tradition of liberty and freedom within a country, then, the prospects for popular government seemed destined to be very poor. Maine summed up this part of his analysis in the following way:

I have thus shown that popular governments of the modern type have not hitherto proved stable as compared with other forms of political rule, and that they include certain sources of weakness which do not promise security for them in the near or remote future. My chief conclusion can only be stated negatively. There is not at present sufficient evidence to warrant the common belief that these governments are likely to be of indefinitely long duration.⁷

Maine had never claimed that democratic institutions were the only cause of social and political upheavals. What he had argued was that popular governments were the least able to withstand the tremendous pressures to which 19th century institutions were exposed. In particular they seemed the least able to resist the dangers from Imperialism, Radicalism and Nationalism. In view of the rapidly changing circumstances and the increasing multiplicity and strength of extremist political movements, Maine felt that the major task of any government must be to maintain order, even if need be, at the expense of some freedom. This, he considered, democratic government incapable of doing.

Maine has been called "the most searching critic of democratic optimism in the Victorian era."⁸ It is essential, however, if his position is not to be distorted, that his understanding of the word democracy be made more explicit. Maine was quite consistent in his use of the term; democracy was, he said, ". . . simply and solely a form of government. It is the government of the State by the Many, as opposed, according to the old Greek analysis, to its government by the Few, and its government by One."⁹ He used the term 'democracy' in its Greek sense because it emphasized the direct participation of the citizen body, as opposed to indirect representation. In modern society, the only means by which the former kind of citizen activity could be secured would be by the use of the referendum or plebescite system. It was against such direct democracy that

Maine focused his attack. Most commentators on his work, however, have attempted to refute this attack by defending representative democracy¹⁰ - the very system which, in its English guise, Maine too was defending. It is here, in the character of Maine's defense, that the lasting value of his prescriptive thought is to be found.

Although Popular Government was occasioned by a particular political situation, it still remains a book which can be read with profit. It can be seen as an attempt to demonstrate the dangers of rationalist thought in politics, of basing political policy on a priori principles or ideological dogma. The dangers of such concepts of political activity remain a threat, and perhaps even more so, in the contemporary world. The essentially practical approach which Maine presents offers a reasoned statement of the middle way. In the vigorous debate over democratic government at the end of the 19th century many who took part believed that direct democratic control by the people would soon be achieved. Among many of the propertied classes, this provoked an extremely reactionary response. Whilst accepting the idea of universal suffrage and the other features of democracy secured earlier in the century, Maine himself was anxious that the balance of society should not be upset by any conflict between these two opposition groups. He wanted to deflate the highly charged atmosphere in which the friction between political movements could prove explosive.

Maine's political thought then, it is true, has a lasting value, but it is best seen in terms of its general approach rather than in the

immediacies of its content. It is the natural, if not logical, outgrowth of his studies into the history of civilisation and represents a sincere attempt to realize the potentials within a changing society. Popular Government must rank high in the statements of conservative thought in this period. It stands as the major representative of the analytical conservative tradition in the 19th century.

REFERENCES

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218	1	<u>Early History of Institutions</u> ; Sir Henry Maine; p. 348.
218	2	<u>ibid.</u> , p. 357.
219	3	<u>ibid.</u> , p. 358.
223	4	<u>The Conservative Mind</u> ; R. Kirk; p. 279.
224	5	<u>Popular Government</u> ; Sir Henry Maine; p. 27.
225	6	<u>Victorian Critics of Democracy</u> ; B.E. Lippincott; p. 167.
225	7	<u>Popular Government</u> ; p. 53.
226	8	Lippincott; <u>op.cit.</u> , p. 167.
226	9	<u>Popular Government</u> ; p. 59.
227	10	See "Sir Henry Maine on Popular Government"; J. Morley; <u>Fortnightly Review</u> , vol. 39, 1886.

BIBLIOGRAPHY

B I B L I O G R A P H Y

PRIMARY SOURCES

- 1856 "Roman Law and Legal Education", in Cambridge Essays (1856); reprinted in Village Communities, 3rd edition, London, 1876, pp. 330-383.
- 1861 Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas. (1st edition 1861, Murray, London.)
- Editions consulted:
- (i) Murray 1930 edition with Introduction and Notes by Sir Frederick Pollock.
 - (ii) Everyman Library edition. London: Dent, 1960 (1st edition, 1906), with Introduction by J.H. Morgan.
 - (iii) World Classics. London: Oxford University Press, 1931, with Introduction by C.K. Allen.
- 1871 Village Communities in the East and West. London: Murray, 3rd edition, 1876 (1st edition 1871). Six lectures delivered at Oxford; to which are added other lectures, addresses and essays, including the Rede Lecture of 1875.
- 1874 Lectures on the Early History of Institutions. London: Murray, 1874.
- 1883 Dissertations on Early Law and Custom. London: Murray, 1883.
- 1885 Popular Government. London: Murray, 1885.
- 1888 International Law: the Whewell Lectures. London: Murray, 1888, edited for publication by Sir Frederick Pollock and Frederic Harrison, Sir Henry Maine's literary executors.

BIBLIOGRAPHY/Primary Sources

Article

"Mr. Godkin on Popular Government", The Nineteenth Century; vol. xix, Jan.-June, 1886, pp. 366-379.

SECONDARY SOURCES

ALEXANDER, E. Mathew Arnold and J.S. Mill; London, 1965.

APPLEMAN, Philip, MADDEN, William A., and WOLFF, Michael, 1859: Entering an Age of Crisis; Bloomington, Indiana, 1959.

ARISTOTLE. The Politics; Translated with Introduction, Notes and Appendixes by Sir Ernest Barker; Oxford, 1946.

BARKER, Sir E. Political Thought in England 1848-1914; Oxford, 1959 (1st published 1915); especially chap. VI, "The Lawyers", pp. 140-160.

BARRY, B.M. Political Argument; London, 1965.

BEER, Samuel. Modern British Politics: a study of parties and pressure groups; London, 1965.

BENN, S.I. and PETERS, R.S. Social Principles and the Democratic State; London, 1959.

BIRCH, A.H. Representative and responsible government: an essay on the British Constitution; London, 1964.

BLAKE, R.N.W. Disraeli; London, 1966.

BOTTOMORE, T.B. Sociology: a guide to problems and literature; London, 1962.

BOWLE, J. Politics and Opinion in the 19th Century; London, 1954; especially Book II, chap. 3, pp. 249-257.

BIBLIOGRAPHY/Secondary Sources

- BRINTON, C. English Political Thought in the 19th Century; Harper Torchbook edition; New York, 1962 (1st published London, 1933); especially pp. 266-281.
- Ideas and Men: the story of Western thought; London, 1951.
- BULLOCK, A. and SHOCK, M. The Liberal Tradition: from Fox to Keynes; London, 1956.
- BURKE, E. Reflections on the Revolution in France; Everyman edition; London, 1910.
- BURY, J.B. The Idea of Progress: an Inquiry into Its Origin and Growth; London, 1920.
- BUTTERFIELD, H. Man on his Past: the study of the history of historical scholarship; Cambridge, 1955.
- CECIL, Lord H. Conservatism; London, 1912.
- COLLINGWOOD, R.G. The Idea of History; Oxford, 1946.
- COLLINS, I. Liberalism in 19th Century Europe; Historical Association Pamphlet; London, 1957.
- COURT, W.H.B. A Concise Economic History of Britain From 1750 to Recent Times; Cambridge, 1954.
- DERRY, J. The Radical Tradition; Tom Paine to Lloyd George; London, 1967.
- DIAMOND, A.S. Primitive Law; London, 1935.
- DICEY, A.V. Lectures on the relations between law and public opinion in England during the 19th century; 2nd edition; London, 1930.
- DRAY, W.H. Philosophy of History; New Jersey, 1964.

BIBLIOGRAPHY/Secondary Sources

- DUFF, Rt.hon.Sir M.E.G. Sir Henry Maine: A brief memoir; with some of his Indian Speeches and Minutes, selected and edited by W. Stokes London, 1892.
- DUNHAM, B. Man against Myth; London, 1949.
- ELLIOT, T.S. Notes Towards a Definition of Culture; London, 1948.
- "The Literature of Politics" in To Criticize the Critic; London, 1965, pp. 136-144.
- D'ENTREVES, A.P. Natural Law: an introduction to legal philosophy; London, 1952.
- FEAVER, G.A. From Status to Contract: a biographical study of Sir Henry Maine 1822-1888; Ph.D. Thesis, 1962 (London University).
- FRIEDMANN, W. Legal Theory; London, 4th edition, 1960.
- GARDINER, P. The Nature of Historical Explanation; Oxford, 1952.
- GODKIN, E.L. Problems of Democracy; New York, 1896.
- GOOCH, G.P. History and Historians in the 19th Century; London, 1913.
- "The Victorian Age 1837-1901" in Social and Political Ideas of the Victorian Age; edited by F.J.C. Hearnshaw; London, 1933, pp. 9-30.
- GRAHAM, W. English Political Philosophy from Hobbes to Maine; London, 1926 (Essay on Maine, pp. 348-415).
- GRAVESON, R.H. Status in the Common Law; London, 1953; especially chapt. III, pp. 33-54.
- GREENLEAF, W.H. Oakeshott's Philosophical Politics; London, 1966.
- GURVITCH, G.D. Sociology of Law; London, 1947.
- GUTTERIDGE, H.C. "The Province of Comparative Law" in Interpretations of Modern Legal Philosophies; edited by E. Sayre; New York, 1947.

BIBLIOGRAPHY/Secondary Sources

- GUTTSMAN, W.L. The British Political Elite; London, 1963.
- HARRISON, F. "A Few Words about the 19th Century" in The Choice of Books and Other Literary Pieces; London, 1886, pp. 417-447.
- The Meaning of History; London, 1862.
- HARRISON, W. Conflict and Compromise: History of British Political Thought 1593-1900; London, 1965, especially pp. 194-196; 210-211.
- HAYEK, F.A. The Constitution of Liberty; London, 1960.
- "History and Politics" in Capitalism and the Historians; edited by F.A. Hayek; London, 1954; pp. 3-29.
- HEARNSHAW, F.J.C. Conservatism in England; London, 1933.
- HINSLEY, F.H. Sovereignty; London, 1966.
- HOGG, Rt.hon. Q.M. The Conservative Case; Penquin Edition; 1947.
- HOUGHTON, W.E. The Victorian Frame of Mind 1830-1870; London, 1957.
- HUME, D. Theory of Politics; edited by F. Watkins; Edinburgh, 1951.
- HUYGHE, R. Van Gogh; New York, 1958.
- JASPERS, K. The Origin and Goal of History; London, 1953.
- JOHNSON, A. The Historian and Historical Evidence; New York, 1926.
- JONES, J.W. Historical Introduction to the Theory of Law; Oxford, 1940.
- KEIR, Sir D.L. The Constitutional History of Modern Britain since 1485; 4th edition, London, 1950.
- KELLETT, E.E. Aspects of History; London, 1938.
- KIRK, R. The Conservative Mind; London, 1954, especially pp. 276-286.
- LETWIN, S.R. The Pursuit of Certainty; Cambridge, 1965.

BIBLIOGRAPHY/Secondary Sources

- LIPPINCOTT, B.E. Victorian Critics of Democracy; London, 1938, pp. 167-206.
- LIPPMANN, W. The Good Society; London, 1937.
The Public Philosophy; London, 1955.
- MACCOBY, S. The English Radical Tradition 1763-1914; London, 1952.
- MATHER, F.C. Public Order in the Age of the Chartists; Manchester, 1959.
- MCDONELL, R.B. British Conservatism 1832-1914; London, 1959.
- MILL, J.S. Essays on Politics and Culture; edited by G. Himmelfarb; New York, 1962, especially the essays on Bentham and Coleridge.
- DE MONTMORENCY, J.E.G. "Sir Henry Maine and the Historical Jurists" in Social and Political Ideas of the Victorian Age; edited by F.J.C. Hearnshaw; London, 1933. pp. 84-99.
- MURRAY, R.H. "Sir Henry Maine and the Comparative Historical Method" in English Social and Political Thinkers of the 19th Century; vol. II, Cambridge, 1929, pp. 48-97.
- OAKESHOTT, M.J. Experience and Its Modes; Cambridge, 1933. (Reprinted, 1966)
"The Masses in Representative Democracy" in Freedom and Serfdom; edited by A. Hunold; Dordrecht, 1961, pp. 151-170.
Rationalism in Politics and Other Essays; London, 1962.
- PARSONS, T., SHILS, S., NAEGELE, K.D., and PITTS, J.R. (eds.) Theories of Society; 2 vols., Glencoe, The Free Press, 1961.
- PATTERSON, E.W. Jurisprudence: Men and Ideas of the Law; Brooklyn, 1953.
- POPPER, Sir K.R. Conjectures and Refutations; London, 1963.
Poverty of Historicism; London, 1957.
- RITCHIE, D.G. Natural Rights: a criticism of some political and ethical conceptions; London, 1895.

BIBLIOGRAPHY/Secondary Sources

- ROBSON, W.A. "Sir Henry Maine Today" in Modern Theories of Law; edited by Sir I. Jennings, Oxford, 1933, pp. 160-179.
- ROSSITER, C.L. Conservatism in America; London, 1955.
- ROUSSEAU, J.J. Political Writings; edited by F. Watkins; Edinburgh, 1953.
- SAWER, G. Law in Society; Oxford, 1965.
- SIDGWICK, H. The Development of European Polity; London, 1903.
- STANLIS, P.J. Edmund Burke and the Natural Law; Ann Arbor, 1958.
- STARK, W. Social Theory and Christian Thought: A Study of Some Points of Contact; London, 1959.
- SYKES, N. "The Age of Reaction and Reconstruction" in Social and Political Ideas of the Age of Reaction and Reconstruction; edited by F.J.C. Hearnshaw; London, 1932, pp. 9-28.
- THOMSON, D. England in the 19th Century; Pelican Edition; 1950.
- VIERECK, P. Conservatism from John Adams to Churchill; New Jersey; 1956.
- VINOGRADOFF, P. "The Teaching of Sir Henry Maine" in Collected Works, vol. II; Oxford, 1928, pp. 173-189 (The Inaugural Lecture of March 1st 1904, reprinted in the Law Quarterly Review, April, 1904).
- WEBB, S. "The Basis of Socialism: Historic" in Fabian Essays in Socialism; edited by B. Shaw; London, 1889, pp. 30-61.
- WHITE, R.J. The Conservative Tradition; London, 1950.
- WHITEHEAD, A.N. Science and the Modern World; Cambridge, 1927.
- WILLEY, B. 17th Century Background; London, 1934.
- WILSON, E. To the Finland Station: a study in the writing and acting of history; London, 1942.
- The Ideas and Beliefs of the Victorians: An Historical Revaluation of the Victorian Age; New York, 1966. This is the publication of a

BIBLIOGRAPHY/Secondary Sources

series of fifty talks given by various specialists on the Victorian Age. They were given on the BBC Third Programme in 1948.

ARTICLES

- BURN, W.L. "English Conservatism"; Nineteenth Century and After; vol. 145, 1949, pp. 1-11; 67-76.
- DEVAS, C.S. "The Decay of the British Constitution"; The Dublin Review; vol. 46, April, 1886, pp. 243-260.
- FEAVER, G.A. "The Political Attitude of Sir Henry Maine: Conscience of a 19th Century Conservative"; Journal of Politics; May, 1965, pp. 290-317.
- GOLDMAN, I. "Evolution and Anthropology"; Victorian Studies; vol. III, 1959-60, pp. 55-75.
- GRAVESON, R.H. "The Movement from Status to Contract"; Modern Law Review; vol. IV, 1940-41, pp. 261-272.
- MORLEY, J. "Sir Henry Maine on Popular Government"; Fortnightly Review; vol. 39, Jan., 1886, pp. 153-173.
- OAKESHOTT, M.J. "Contemporary British Politics"; Cambridge Journal; vol. I, April, 1948, pp. 474-490.
- "Conservative Political Thought"; The Spectator; 193, Oct., 1954, pp. 472-474.
- "The Principles of Politics by J.R. Lucas - a review by M. Oakeshott"; Political Studies; vol. XV, June, 1967 (no. 2), pp. 224-227.
- POLLOCK, F. "Sir Henry James Sumner Maine (1822-1888)"; Encyclopedia Britannica; 10th edition, London, 1902, pp. 476-477.

BIBLIOGRAPHY/Articles

- ROACH, J. "Liberalism and the Victorian Intelligentsia"; Cambridge Historical Journal; 13, 1957, pp. 58-81.
- SMELLIE, K.B. "Sir Henry Maine"; Economica; vol. VIII, March, 1928 (no. 22), pp. 64-94.
- "Sir Henry Maine"; Encyclopedia of Social Sciences; edited by E.R.A. Seligman; vol. 9, 1954 (New York), pp. 49-50.
- SMITH, B.C. "Maine's Concept of Progress"; Journal of the History of Ideas; 24, 1963, pp. 407-412.
- WOLIN, S.S. "Hume and Conservatism"; American Political Science Review; 1954, pp. 999-1016.