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### **THE LEGACY OF SIR HENRY MAINE.**

Sir Henry Maine (1822-1888) was a distinguished lawyer, academic and civil servant of mid-Victorian England, holding chairs in Civil Law at Cambridge and Oxford, the legal member of the Council of India for seven years from 1862 and Master of Trinity Hall in Cambridge from 1877.<sup>1</sup> It is for his prolific writings and their influence on modern anthropology, of which, along with Tylor and Morgan, he is one of the founding fathers, that we best know him. His books included **Ancient Law**(1861), **Village Communities in the East and West**(1871), **Lectures on the Early History of Institutions**(1875) and **Dissertations on Early Law and Custom**(1883). He was a polymath, writing about 'ancient customs, modern politics, scientific theories, the development of languages, statute law, poetry, philosophy, literature, whether women are more conservative than men, the extent to which law changes society and society changes law, Roman agriculture, Greek civilisation, the caste systems of India, the failings of Bentham, the achievements of Bentham, the consequences of imposing British law on societies governed by custom, the merits of American social values and many, many other matters.'<sup>2</sup>

Maine was only one of many thinkers, including Herbert Spencer, Karl Marx, Frederick Engels, Edward Tylor and Lewis Morgan who were trying to fit the huge influx of comparative data from the expanding European empires into a pattern of world history. Yet it is worth considering him in detail since, as a lawyer and Cambridge predecessor, he had a particular influence on Maitland. In some ways, Maitland's work can be seen as a wrestling with the ghost of Maine, though this is usually concealed. Very often Maitland either ignored Maine, implicitly criticized him, or, very occasionally, made disparaging remarks about the quality of his scholarship.<sup>3</sup> Yet a consideration of Maine's writings helps to place Maitland's work within the context of mid-Victorian social thought and to provide some

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<sup>1</sup> For a useful introduction to Maine's work, see Feaver, **From Status**; Cocks, **Maine** and Diamond (ed.), **Victorian Achievement**.

<sup>2</sup> Cocks, **Maine**, 13

<sup>3</sup> For the ignoring and implicit criticism, see Cocks, **Maine**, 142-6; for explicit criticism of the fact that Maine 'trusted much to a memory that played him tricks and rarely looked back at a book that he had once read', see Maitland, **Letters**, I, 279.

comparative perspectives on topics which would pre-occupy him.

Maine's central aim was to explain how modern civilization had emerged in certain 'progressive' societies. His most important generalization was that concerning the movement from societies based on status (kinship, tribe) to societies based on contract (the State). One part of this theory is shown in his treatment of individual rights. His wide sweep allowed him to see 'by what insensible gradations the relation of man to man substituted itself for the relation of the individual to his family, and of families to each other'; 'Ancient Law...knows next to nothing of Individuals. It is concerned not with individuals but with Families, not with single human beings, but groups.'<sup>4</sup> If we take all these points together, and then look at nineteenth-century England, Maine argued, echoing his other famous formulation, the 'movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account.'<sup>5</sup>

This contrast between group-based and individual-based society is part of that movement from status to contract which Maine thought was the greatest of all changes. 'Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.'<sup>6</sup> Thus, the relations of parent to child, master to slave, male to female, based on birth and ascribed status, melt before the negotiated relations of free individuals. It is in this sense that 'we may say that the movement of the progressive societies has hitherto been a movement **from Status to Contract**.'<sup>7</sup> Thus, 'the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract...old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention.'<sup>8</sup>

Maine believed that the earliest societies had been based on large corporate groups of kin, organized through the male line, what was then known as the 'patriarchal theory'. 'Corporations **never die**, and

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<sup>4</sup> Maine, **Ancient Law**, 185, 258

<sup>5</sup>Maine, **Ancient Law**, 168

<sup>6</sup> Maine, **Ancient Law**, 169

<sup>7</sup> Maine, **Ancient Law**, 170

<sup>8</sup> Maine, **Ancient Law**, , 304

accordingly primitive law considers the entities with which it deals, **i.e.** the patriarchal or family groups, as perpetual and inextinguishable.<sup>9</sup> Yet Maine's theory of patriarchal origins left him unable to solve his larger puzzle. His problem was how to explain the origins of modern civilization in the 'progressive' societies. This consisted in the movement from status, or kinship-based, societies, to modern contractual society. The essential bridge was the destruction of kinship in the feudal period. But he never solved the problem of where the magic ingredients of feudalism came from. We will return to this when considering his ideas of property. But it is worth noting here that by assuming the uniformity of the agnatic, kinship-dominated stage, he seemed to leave no room for the seeds of contract. The idea of alienability, or of primogeniture, seemed to spring from a clear sky. Thus, for instance, he says that there is no concept of primogeniture or its associated ideas in Roman law, in Hindu law or in ancient German law. All children were co-owners with their family. Suddenly it emerges.<sup>10</sup>

Maine did recognize that there was something odd about Anglo-Saxon kinship, writing that in the important area of joint property 'the general usage of the old Germanic peoples - it is remarkable that the Anglo-Saxon customs seem to have been an exception - forbade alienations without the consent of the male children.'<sup>11</sup> Nevertheless, in general, he tended to assume its basically agnatic quality. He never solved this central puzzle. As we shall see in the next chapters, it was solved by Maitland, who provides the key to understanding how Maine's world came about and thus gives us clues to solve our problem concerning the origins of modernity. Maitland was able to show that there were elements in the kinship system of the Germanic peoples which already suggested an alternative to joint property and patriarchal organization; the seed was there, and the mystery of feudalism is not quite as deep as it once seemed.

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Another way of putting Maine's famous contrast was to say that in most societies, including that which he later saw in India, the community is very strong and the individual weak, while in mid-nineteenth century Europe, the reverse was true. One of the major lessons, and one which it 'is often said that it takes two or three years' for a new visitor to India to learn, is that 'the vast Indian population is an aggregate of natural groups, and not the mixed multitude he left at home...'<sup>12</sup> He believed that this had once been the case in England and in Europe, in the Dark Ages. There had been a growth of 'Village

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<sup>9</sup>Maine, **Ancient Law**, 126

<sup>10</sup> Maine, **Ancient Law**, 227ff

<sup>11</sup> Maine, **Ancient Law**, 280

<sup>12</sup> Maine, **Early History**, 30-1

Communities', and the 'historian of former days laboured probably under no greater disadvantage than that caused by his unavoidable ignorance of the importance of these communities...'<sup>13</sup> What, then, did Maine mean by 'community'?

There are a number of characteristics which, according to Maine, constitute a community. Communities are 'naturally organized', that is to say the bond that unites people is a natural, rather than an artificial one. The two major bonds are kinship, in tribal communities, and territory, in village communities. The early bond of kinship had given place in both India and Europe to the bond of locality. The 'Indian Village-Community is a body of men held together by the land which they occupy: the idea of common blood and decent has all but died out.'<sup>14</sup> This is still a 'true Village-Community'<sup>15</sup>, even though there had been a transition from the earlier form of 'the Village-Community, a brotherhood of self-styled kinsmen, settled on a space of land.'<sup>16</sup>

He believed that once upon a time the village community had been a collective entity in terms of landholding, both in India and early Europe. This collectivity manifested itself in terms of the absence of individual rights. Maine argued that there was no concept similar to the modern Western one of inalienable human rights in the traditional village community. 'Nor, in the sense of the analytical jurists, is there **right** or **duty** in an Indian village-community; a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society.'<sup>17</sup> The growth of individual rights was one of the major transformations which had occurred in western Europe, and would soon break up the natural communities of India.

Another feature singled out by Maine was 'self-existing'. By this he probably meant 'self-sufficient'. He described how Indian villages were 'total' economies, not dependent for goods on the outside world. In fact, he envisaged in the earliest stage 'a territory occupied by village-communities, self-acting and as yet autonomous, each cultivating its arable land in the middle of its waste, and each, I fear I must add, at perpetual war with its neighbour.'<sup>18</sup> These were little kingdoms. He described how the mixture of

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<sup>13</sup> Maine, **Early History**, 76-7

<sup>14</sup> Maine, **Earl History**, 82

<sup>15</sup> Maine, **Early History**, 78

<sup>16</sup> Maine, **Early Law and Custom**, 327

<sup>17</sup> Maine, **Village Communities**, 68

<sup>18</sup> Maine, **Village Communities**, 192

occupations in an Indian village seemed to cover all human needs, and wrote that it is 'the assignment of a definite lot in the cultivated area to particular trades which allows us to suspect that the early Teutonic groups were similarly self-sufficing.'<sup>19</sup>

Maine thus created a model of a village community, with the natural bonds of blood or locality, rather than artificial bonds of money and contract, with communal ownership of some form, with economic and political self-sufficiency, and with customary law. This he believed was a transitional form between tribal and modern society. He was aware, however, of certain limitations to the model: these village communities, for example, were neither homogeneous nor egalitarian: 'The brotherhood, in fact, forms a sort of hierarchy' in an Indian village, in which there are dominant families.<sup>20</sup> In fact, Indian village communities 'prove on close inspection to be not simple but composite bodies, including a number of classes with very various rights and claims.'<sup>21</sup> This was, in fact, the start of a departure of reality from the model. For Maine was quite aware that his description of the Indian village community was already an idealized model of what had faded away. In Bengal, 'from causes not yet fully determined, the village system had fallen into great decay.'<sup>22</sup> He believed that the concepts of private property and individual rights encouraged by British law would lead the village community to disappear<sup>23</sup>; already 'the Indian village-community is breaking to pieces.'<sup>24</sup>

Maine devotes less attention to the village community in the European sphere, but it is clear that he believed that early Germanic society had passed through this stage of village communities, a view shared by many of his contemporaries. This faced him with a very difficult problem. If all Indo-European societies went through a stage, after tribalism, of 'village communities', how did the curious privatized property of parts of western Europe emerge?

Maine believed that one could speak about 'communal' ownership of land, or perhaps the absence of any private ownership, as the original state out of which all societies have evolved. Thus he speaks of

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<sup>19</sup> Maine, **Village Communities**, 126

<sup>20</sup> Maine, **Village Communities**, 177

<sup>21</sup> Maine, **Village Communities**, 123

<sup>22</sup> Maine, **Village Communities**, 104

<sup>23</sup> Maine, **Early History**, 82

<sup>24</sup> Maine, **Village Communities**, 112

'that collective ownership of land which was a universal phenomenon in primitive societies...'<sup>25</sup> He argues concerning India that 'there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property...'<sup>26</sup> In this way, he believed that India followed the pattern of all early Aryan societies.<sup>27</sup> He believed that this was a system characteristic not only of ancient and oriental societies, but even of Scotland and Ireland into the seventeenth century.<sup>28</sup> The development of private, individual, property out of such communal property, 'the process by which the primitive mode of enjoyment was converted into the agrarian system, out of which immediately grew the land-law prevailing in all Western Continental Europe before the first French Revolution and from which is demonstrably descended our own existing property law', was, Maine declared, 'the great problem of legal history.'<sup>29</sup> How then did he attempt to solve this 'great problem'?

An oversimplified, single-word, answer is 'feudalism'. In earlier societies and civilizations there had certainly been the concept of private property, in other words private, individual ownership of certain commodities. In Rome, for example, all things except slaves, land, oxen and horses could be treated by an individual as his private property.<sup>30</sup> But the great transformation, and the one to be explained, was the emergence of private property in land. This was inextricably linked to the development of the 'feud' or indivisible estate. Feudalism introduced the new notion of indivisibility, and the collapse of feudalism set the individual free to dispose of all objects on the market as his own. Without the collapse of feudalism, 'we should never have had the conception of land as an exchangeable commodity...'<sup>31</sup>

Maine saw a number of threads coming together to endow feudalism with this new arrangement. Partly it was the unrestrained power of manorial lords over their own demesne land. The 'emancipation of the

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<sup>25</sup> Maine, **Village Communities**, 141

<sup>26</sup> Maine, **Village Communities**, 76

<sup>27</sup> Maine, **Early Law**, 235

<sup>28</sup> Maine, **Early History**, 102-3

<sup>29</sup> Maine, **Village Communities**, 131

<sup>30</sup> Maine, **Early Law**, 337

<sup>31</sup> Maine, **Early History**, 86-7

lord within his own domains from the fetters of obligatory agricultural custom' suggested 'a plausible conjecture that our absolute form of property is really descended from the proprietorship of the lord in the domain...'<sup>32</sup> Other powerful forces were the development of written wills, encouraged by the Church, and the granting of land by 'book' to religious bodies. Gradually rights to land came to be looked on as a personal commodity, which could be sold or exchanged just like any other commodity. He pointed out that in England titles to manorial estates, and to the copyholds within those estates, were conceived of as having been originally purchased or acquired.<sup>33</sup> Hence, they could be sold on to another. The internal dissolution of feudalism in England started as soon as feudalism itself, many centuries before the 'bastard feudalism' of the fourteenth and fifteenth centuries. Feudalism was the catalyst and primogeniture was linked to 'the crucible of feudalism'<sup>34</sup>; for instance 'the Feudal law of land practically disinherited all the children in favour of one...'<sup>35</sup> This made it possible that 'the equal distribution even of those sorts of property which might have been equally divided ceased to be viewed as a duty.'<sup>36</sup>

Maine argued that the central feature of feudalism was that it 'mixed up or confounded property and sovereignty'<sup>37</sup>, every lord of a manor having both economic and judicial rights. Political power and economic power were both delegated down the same hierarchical chain. A second feature was the ability to conceive of different layers of ownership or possession within feudal tenures: the 'leading characteristic of the feudal conception is its recognition of a double proprietorship, the superior ownership of the lord of the fief co-existing with the inferior property or estate of the tenant.'<sup>38</sup> A third feature is that the whole structure was based not on inherited relations of 'status', but on acts of will or 'contract'. In feudalism, the famous bridge from societies based on status to those based on contract was, perhaps for the first and only time, crossed. This point was memorably emphasized by Maitland.

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<sup>32</sup> Maine, **Village Communities**, 162, 165

<sup>33</sup> Maine, **Early Law**, 325

<sup>34</sup> Maine, **Ancient Law**, 237

<sup>35</sup> Maine, **Ancient Law**, 225

<sup>36</sup> Maine, **Ancient Law**, 225

<sup>37</sup> Maine, **Early Law**, 148

<sup>38</sup> Maine, **Ancient Law**, 295

The master who taught us that "the movement of the progressive societies has hitherto been a movement from Status to Contract", was quick to add that feudal society was governed by the law of contract. There is no paradox here. In the really feudal centuries men could do by a contract of vassalage or commendation, many things that can not be done now-a-days...Those were the golden days of "free", if "formal" contract.<sup>39</sup>

If the gateway from ancient to modern civilizations as Montesquieu, Tocqueville, Marx and Maine all believed, was feudalism, we are pushed back to considering the origins and nature of feudalism. Maine suggested primitive roots which led him back into widespread Indo-Aryan systems. The mixture of Roman and Germanic civilization was a particular branch of a tree which also had major branches in Celtic and Indian civilization. Yet he implied that in the other two branches, the major transition beyond a very early sort of quasi-feudalism had not occurred and might never have done so without the pressure of British civilization which had evolved in a particular manner.

Maine tried to sketch out the origins of feudalism in England, though his account was clouded for lack of accurate date. His view was that while it was the legal orthodoxy of his time that all that was important in feudalism dated from after the Norman invasion, much that was characteristic of fully developed feudalism was already present in Anglo-Saxon England. The court leet, he argued, arose from the old township assemblies rather than from royal (Norman or Angevin) grants, as lawyers had argued.<sup>40</sup> The common-field and three-field systems were present in Germanic societies; the 'three-field system was therefore brought by our own Teutonic ancestors from some drier region of the Continent.<sup>41</sup> The whole manorial system was pre-Norman, both the concept of the manor and that of copyhold tenure.<sup>42</sup> Thus while 'the ordinary text-books...practically trace our land-law to the customs of the Manor, and assume the Manor to have been a complete novelty introduced into the world during the process which is called the feudalisation of Europe',<sup>43</sup> in fact, he argued, the Germanic landholding systems did not just die out at the Conquest, but very greatly influenced subsequent land-law.<sup>44</sup> He

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<sup>39</sup> Maitland, **History**, II, 232-3

<sup>40</sup> Maine, **Village Communities**, 139

<sup>41</sup> Maine, **Village Communities**, 200-1

<sup>42</sup> Maine, **Early Law**, 302ff

<sup>43</sup> Maine, **Village Communities**, 11

<sup>44</sup> Maine, **Village Communities**, 83, 11



argues that 'the primitive Teutonic proprietary system had everywhere a tendency, not produced from without, to modify itself in the direction of feudalism.'<sup>45</sup> This tendency was particularly marked in England because Germanic customs were not destroyed by the reintroduction of Roman law: 'English institutions have never been so much broken as the institutions of other Germanic societies by the overwhelming disturbance caused elsewhere by Roman law and Roman legal ideas.'<sup>46</sup> Yet there was some trace of Romanism, an essential ingredient, for the ground in England had been prepared by a previous Romanized population.<sup>47</sup>

Maine hoped to solve the riddle of what lay in early tribal property systems which would mean that, when mixed with Roman civilization, a new property law would emerge. He believed that he had found in early Irish law 'a feudal system (if we may so call it) dependent on cattle and kinship instead of land and tenure.'<sup>48</sup> The model of the central principle of feudalism, the 'Benefice or Feud', was, he argued, 'mainly taken from that which the men of primitive Aryan race had considered as appropriate to chiefships or sovereignties...'<sup>49</sup> The origins of private property thus arose from 'the ever-increasing authority of the Chief, first over his own domain and "booked" land, and secondarily over the tribe lands', a process which was beginning long before the Norman conquest.<sup>50</sup> The chiefs or kings then granted benefices, or permanent, indivisible blocks of land to others.<sup>51</sup> Thus feudal notions 'had somehow been introduced into the Western world by the barbarous conquerors of the Roman Imperial territories.'<sup>52</sup>

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<sup>45</sup> Maine, **Village Communities**, 21

<sup>46</sup> Maine, **Early Law**, 167

<sup>47</sup> Maine, **Village Communities**, 147

<sup>48</sup> Maine, **Early Law**, 348

<sup>49</sup> Maine, **Early Law**, 349

<sup>50</sup> Maine, **Early History**, 115

<sup>51</sup> Maine, **Early Law**, 345

<sup>52</sup> Maine, **Early Law**, 149

These are sweeping thoughts, but Maine was one of the first to examine these themes in a critical way. He specified very clearly what the important development had been, namely the emergence of contractual-based societies. Yet he was unable to solve the question of how such societies had emerged and, as Maitland would show, his grand theory of the movement from status to contract needs re-thinking. Both the magnitude of his contribution and a specification of what qualities were needed to go further than Maine were summarized by Maitland. In his Inaugural Lecture, delivered on 13 August 1888, some six months after Maine's death, Maitland spoke as follows. 'Of the great man who when that science [comparative jurisprudence] exists will be honoured as its prophet, and its herald, of the great man whom we have lost, may I say this? His wonderful modesty, his dislike of all that looked like parade, or pedantry, the fascination of his beautiful style are apt to conceal the width and depth of his reading. He was much more than learned, but then he was learned, very learned in law of all sorts and kinds. It is only through learning wide and deep, tough and technical, that we can safely approach those world-wide questions that he raised or criticize the answers that he found for them.'<sup>53</sup> We may now turn to Maitland himself who accumulated that 'learning wide and deep, tough and technical' and hence put himself in a position to resolve some of the questions raised by Maine.

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<sup>53</sup> Maitland, **Collected Papers**, I, 486-7