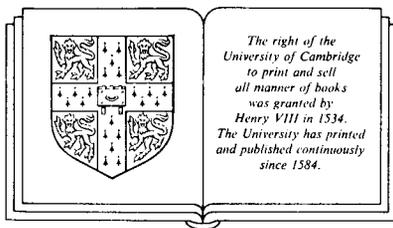


# SIR HENRY MAINE

A STUDY IN VICTORIAN  
JURISPRUDENCE

R. C. J. COCKS



CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE  
NEW YORK NEW ROCHELLE  
MELBOURNE SYDNEY

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK  
40 West 20th Street, New York NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Cambridge University Press 1988

This book is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 1988

First paperback edition 2002

*A catalogue record for this book is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Cocks, Raymond.

Sir Henry Maine: a study in Victorian jurisprudence,

R. C. J. Cocks.

p. cm. – (Cambridge studies in English legal history)

Includes index.

ISBN 0 521 35343 2

1. Maine, Henry Sumner, Sir, 1882–1888. 2. Law – Great Britain –  
History and criticism. 3. Jurisprudence – History. I. Title.

II. Series.

KD631.M28C63 1988

349.41–dc19

[344.1] 88-10228 CIP

ISBN 0 521 35343 2 hardback

ISBN 0 521 52496 2 paperback

## CONTENTS

<i>Acknowledgments</i>	<i>page</i>	vii
INTRODUCTION		
Maine's ideas		1
Maine's life		9
1 THE EARLY THOUGHTS ABOUT LAW		13
Sources and themes		13
Victorian legal science		14
Maine and legal science		17
Philology, India and Roman law		19
Historical jurisprudence		24
Maine, science and history		32
2 LAWYERS AND MAINE'S JURISPRUDENCE		39
Being a lawyer		39
Legal practice		40
Learning law		46
3 'ANCIENT LAW'		52
<i>Ancient Law</i> for the 'informed public'		53
<i>Ancient Law</i> for the lawyers		64
<i>Ancient Law</i> for the theorists		71
A synthesis		75
4 AFTER 'ANCIENT LAW'		79
Indian villages and English utilitarians		79
Indian and English lawyers		88

5	THE DECLINE OF A JURIST	101
	<i>Village Communities</i>	101
	<i>The Early History of Institutions</i>	112
	<i>Dissertations on Early Law and Custom</i>	125
	<i>Popular Government</i>	131
6	THE RECEPTION OF MAINE'S JURISPRUDENCE	141
	Historical jurisprudence	141
	Sociology	155
	Anthropology	159
	Sociology, anthropology and 'status to contract'	169
	American legal realism	180
	English jurisprudence	183
7	CONCLUSION	196
	Maine's jurisprudence	196
	The failings of Maine's jurisprudence	198
	The achievements of Maine's jurisprudence	209
	<i>Index</i>	217

## INTRODUCTION

### MAINE'S IDEAS

In 1861 Maine published a book which he hoped would do much to improve the condition of English jurisprudence. In *Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas* he wished to describe very old types of law, to explain these types by reference to their social and intellectual context, and to consider the relationship between them and modern forms of legal analysis. In the words of the brief preface to the first edition: 'the direct 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 these ideas to modern thought'.

Within a few years of its publication it was clear that he had written a popular book. In the view of a modern commentator discussing the development of law in the nineteenth century, Sir Henry Maine 'wrote the only legal best seller of that, or perhaps any other century'.<sup>1</sup> The popularity is easy to explain. The book is so well written that it has an appeal to readers of any generation; and to Victorians it had the added attraction of containing references to numerous topics which were fashionable at the time. For example, it explored matters such as the moral issues relating to the financial collapse of large banks; the importance of comparative studies of different societies in any attempt to discover the responsibilities of imperial government in India; and the possible relevance to British politics of continental ideas about liberty.<sup>2</sup> Throughout, topics such as these were related to controversial themes and it was particularly noticeable that almost everything he said could be given a place in the Victorian debate about

<sup>1</sup> A. W. B. Simpson, 'Contract: The Twitching Corpse', *Oxford Journal of Legal Studies*, vol. 1 (1981), p. 265 at p. 268.

<sup>2</sup> These and numerous other topics of concern to his Victorian contemporaries are considered in chapter 3 below.

progress. Like his contemporaries, he sought constantly to assess whether or not certain practices encouraged or impeded the development of societies. On a level of great generality it was even possible for his readers to compare his observations on the evolutionary progress of social groups with, say, Darwin's analysis of organic change, or Herbert Spencer's attempt to reveal the laws of transformation for the universe.

Maine's interest in these ideas requires a two-fold response from the legal mind of the late twentieth century. Firstly, it is necessary to resist the temptation to detach his jurisprudential arguments from his Victorian concerns because, as we will see, the latter did much to influence his approach to law. Secondly, and more important, any attempt to isolate Maine's jurisprudential thought is likely to draw attention away from one of his chief beliefs about legal analysis; he believed that in seeking to understand law the best results could be achieved by making constant references to non-legal topics. Ultimately, law had to be accounted for and criticised in non-legal terms. After all, a man who wrote about progress had at some stage to write about legal change and was then confronted by the fact that law did not create itself and was not changed by itself.

Writers on Maine's jurisprudence have often responded to his interest in the context of law by contrasting his ideas with those of the utilitarian jurists who preceded him, Bentham and Austin.<sup>3</sup> It is sometimes said that the latter two jurists provided an explanation of law which was almost wholly abstract. Their names have been linked with the notion that law may be explained entirely in terms of concepts such as 'sovereignty' and 'command' rather than by reference to social practices and historical events. Viewed in the former way, law has the same qualities in all places at all times, and therefore may be explained in terms which are independent of any particular place in which it functions.

For Maine such a view was incorrect; law was the product of time and place, and the theories of Bentham and Austin were themselves products of particular 'limited' historical circumstances; the emphasis upon 'sovereignty' and 'command' arose out of the need to explain aspects of the social, political and legal structure of industrial societies in the west. It followed that such terms were inappropriate for the analysis of, say, the ancient laws of India. The correct study of law

<sup>3</sup> The reception of his ideas in the context of English jurisprudence is considered in chapter 6 below, pp. 183-95.

began with the observation of its place in any particular society; and such a starting point revealed that it was impossible to describe law by using the same terms for all legal phenomena in all areas.

In itself, this common view of Maine as a critic of 'merely' abstract theories of law is well-founded. When he wrote *Ancient Law* he believed that his critical remarks about the utilitarian jurists constituted one of the improvements which he could bring to English jurisprudence.<sup>4</sup> However, in isolation such comments give Maine's writing a negative quality which is unrepresentative of his work as a whole. There is an additional, positive aspect to his analysis which is best introduced by looking to his account of what other Victorian jurists called 'the natural history of law'.<sup>5</sup> Maine set out to reveal the phases of evolutionary legal development. He believed in an initial stage in which the unregulated personal commands of someone in authority are thought to be of divine inspiration. 'They are simply adjudications on insulated states of fact, and do not necessarily follow each other in any orderly sequence.'<sup>6</sup> In the course of time the individuals who issued such commands were replaced by groups such as aristocracies who knew the law and administered it. Unlike their predecessors they 'do not appear to have pretended to direct inspiration for each sentence'.<sup>7</sup> The law 'known exclusively to a privileged minority, whether a caste, an aristocracy, priestly tribe, or a sacerdotal college, is true unwritten law'.<sup>8</sup> After this 'period of Customary law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen . . . laws engraven on tablets and published to the people take the place of usages deposited with the recollection of a privileged oligarchy.'<sup>9</sup> The chief cause of the change was easily identified: 'though democratic sentiment may have added to their popularity, the codes were certainly in the main a direct result of the invention of writing'.<sup>10</sup>

<sup>4</sup> He considers the matter in forceful terms in chapter 1 of *Ancient Law* (London, 1905) pp. 7–8. On p. 7 he wrote that 'it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined'.

<sup>5</sup> For example, Sir Frederick Pollock, in 'Sir Henry Maine as a Jurist', *Edinburgh Review*, vol. 177 (July 1893), p. 104, and in *Introduction and Notes to Sir Henry Maine's 'Ancient Law'* (London, 1906), p. viii.

<sup>6</sup> *Ancient Law*, p. 9 and, at p. 5, ' . . . they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments'.

<sup>7</sup> *Ibid.*, p. 12, chapter 1.

<sup>8</sup> *Ibid.*, p. 13, chapter 1.

<sup>9</sup> *Ibid.*, p. 14, chapter 1.

<sup>10</sup> *Ibid.*, p. 15, chapter 1.

Most societies never moved, as it were, beyond this stage. 'When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without.'<sup>11</sup> However, if change did happen, the stages of subsequent progressive alterations could be identified by pointing to the agencies by which law was brought into harmony with novel social conditions. Maine wrote: 'These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them . . . I know of no instance in which the order of their appearance has been changed or inverted.'<sup>12</sup> In the words of a modern writer, the 'thesis implied a natural progress from making changes while pretending not to (fictions), through making exceptions in particular cases (equity), to direct change by virtue of authority or power'.<sup>13</sup> The content of the law in progressive societies also changed. In one of his most famous observations, Maine stated that there was a transition from status to contract. Status rights, such as those which could be claimed by a woman by reason of her being a woman, gave way to contractual rights arising out of negotiations between individuals.<sup>14</sup>

However, any account of Maine's jurisprudence which attempts to respond to the positive aspects of his writing has to contain more than a description of evolutionary change in law. In the course of the present book it will be argued that these descriptive accounts of historical change need to be integrated into a broader argument concerned with the social responsibilities of lawyers and other citizens. In particular, it will be argued that Maine tried to explore the responsibilities people had in respect of law reform and social improvement. Admittedly, this has already been considered to some extent by other writers such as Dias and Harris who have observed, in substance, that Maine was no antiquarian devoted to the past for its

<sup>11</sup> *Ibid.*, p. 21, chapter 1.

<sup>12</sup> *Ibid.*, p. 25, chapter 2.

<sup>13</sup> J. H. Baker, *An Introduction to English Legal History* (London, 1979), p. 170. This aspect of Maine's work has received comparatively little attention in modern times.

<sup>14</sup> For example: '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.' (*Ancient Law*, p. 169, chapter 5.) But Maine described the change in different ways in other places, and there is a problem in deciding which is most appropriate: see, generally, chapter 6, pp. 169–80 below, and G. MacCormack, 'Status: Problems of Definition and Use', *Cambridge Law Journal* (1984), pp. 361–76.

own sake.<sup>15</sup> It is implicit, too, in the commentaries which stress Maine's hopes as to the possible change in law from rights based upon status to those based upon contract; he had a personal enthusiasm for the change. But the present study seeks to go beyond such observations and show that Maine related these and many other recommendations to a wider theory. We will see that for him, when law was understood in terms of the social developments which he described, certain facts about legal change became much clearer than they had been. There might be intricate disputes about the best way of defining the phases of legal change (was an age of Equity always succeeded by an age of Statute, and so on?) but it was safe to predict that usually social conditions changed law rather than that law changed social conditions. Because of the propensity for law to 'grow' out of harmony with social interests, the jurist had a duty to do what he could to ensure that law and social interests did not draw apart and this, in turn, meant that he had to explain how laws could be changed. Usually the jurist had to concentrate on removing elements which were obscure to the layman because these obscurities concealed the gap between the law and real social interests. If the obscurities were defended by practising lawyers it was the task of the jurist to expose what the lawyers were doing and to suggest alternatives. The best response took the form of the scientific analysis of law which (as we will see) involved in part the attempt to discover principles which could be stated in simple terms and incorporated in a code. Such a form of law could be understood by all informed citizens and could be criticised and revised in the light of public debate concerned with ensuring that law responded to social events. In this way the law served the interest of society rather than that of a few legal experts.

If this had already been said by Bentham (and others) then the difference in Maine's case lay in his explicit confidence in the capacity for a cultured elite to produce law which responded appropriately to social changes by having regard to the facts of the legal past. When social conditions in combination with a suitable response from this elite enabled law to move from status to contract Maine was pleased, but this was, as it were, a bonus. His usual concern was with preventing law from becoming unrelated to society. Law varied greatly with place and time but, subject to a few qualifications, in progressive

<sup>15</sup> R. W. M. Dias, *Jurisprudence* (London, 1985), p. 388: Maine 'often contended that the confused state of English law was due to its pre-eminently judge-made character'; J. W. Harris, *Legal Philosophies* (London, 1980), p. 223.

societies at least the jurist had the same task in all places at all times. Above all, he had to reveal which laws were most appropriate for any given social situation; and in order to do this he had to have a knowledge of history. This would enable him both to understand change and to reveal the inadequacies of those lawyers who resisted desirable reforms or (more rarely) sought immediate measures which were too radical. For example, the jurist could criticise utilitarian or natural law theorists when the latter justified their arguments by reference to grandiose definitions of law which had little relationship to social facts. In the course of time, everything about law changed, and lawyers were never justified in opposing change by referring to their preconceived ideas. This was particularly so in progressive societies:

with respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.<sup>16</sup>

Lawyers had the humble task of responding to social events by rethinking their ideas about law; and when they did this they were obliged to adopt arguments which could be understood and appreciated by informed citizens as well as fellow lawyers. By itself the legal mind could never create good law. It had to be guided by people with experience outside the world of law. It was as if, for Maine, when new law was being created the lawyer had the task of a midwife rather than a parent.

But even an attempt to integrate his evolutionary information into his broader interpretation of what made for good law fails to provide a complete outline of the essential and more positive parts of Maine's jurisprudence. It does not take account of the fact that the constant application of historical analysis to a great range of contrasting examples and theories has a significant cumulative effect. Unfortunately, it is hard to define.

Another Victorian jurist, Sir Frederick Pollock, saw that Maine's work presented special problems in this respect. In terms which were self-consciously vague he argued that

<sup>16</sup> *Ancient Law*, p. 24, chapter 2.

Maine's work is not architectural but organic. His ideas are not presented in the form of finished propositions that can be maintained and controverted in the manner of a thesis. Rather they appear to grow before our eyes, and they have never done growing. The roots are the same, the flowers and fruit are various. We are constantly brought home again after digressions and excursions, often in quite unexpected ways. Therefore Maine's books cannot be arranged in a linear series as chapters of an *opus magnum*. It would be idle to prescribe a fixed order for reading them, as if they were a history or a code. Those who expect to find instruction ready made in them will hardly be satisfied; those who seek not compendious formulas to be learnt by rote or set down in notebooks, but thoughts to be assimilated for the guidance and education of the historic faculty, will seldom indeed be disappointed. In this we see no more than the proper and almost necessary attribute of a master whose business is to give us examples of method, not to inform us of facts.<sup>17</sup>

This lack of interest in 'compendious formulas' on Maine's part makes a succinct description of his jurisprudence almost impossible and requires that any brief account is expressed in a manner which is unrepresentative of his style. However, if the *content* of his jurisprudence could be described in a few words it might be done by referring, firstly, to his evolutionary account of law with its emphasis upon the context of legal systems and, secondly, to his analysis of how good legal reforms could be obtained. If the *approach* he adopted was to be put in a few words it would have to be described as consisting in the presentation of information about the past in such a way as to change and improve legal thought. An awareness of the salient facts of legal history ensured that lawyers and non-lawyers knew that there was nothing permanent in law, and at the same time it provided them with the best guide for the management of legal change.

There is nothing contentious in pointing out above that Maine was concerned with explaining the historical development of law, and with using his historical information to reveal inadequacies in the work of utilitarian theorists or writers on natural law. However, what has been said about other matters does require justification. It will be necessary to describe in some detail the prescriptive elements in Maine's writing, and to relate them to his general analysis of the duties of people involved in legal and social reform; and, of course, it is also necessary to explore the full range of the uses to which he put history in the course of developing his arguments. In doing these things it will become clear that a study of such topics require a reduction in the

<sup>17</sup> Pollock, 'Sir Henry Maine as a Jurist', p. 102.

emphasis which commentators with other objectives have previously given to certain elements in his work. In particular, much less attention will be given to his writing on Roman Law and Patriarchal Societies; both these aspects of his thought merit separate study in their own right but there are limits to the extent to which they can be used as guides to his jurisprudence. In contrast, much more attention will be given to subjects such as his writing on the science of law, the legal profession and legal education. In the course of doing this, the context in which he placed law will not be explained (as it sometimes has been) almost entirely by reference to the facts of ancient history. Instead, in accordance with his expressed intentions, the references to earlier events will be linked to his writing on later issues and, in considering this, the importance of his commitment to Victorian debates will become apparent. This change in perspective will make it possible to reassess the quality of his writing on law.

The justification for producing the present study is simply that Maine has often been regarded as an important jurist but there has never before been a book exclusively concerned with his jurisprudence. No doubt the explanation for this lies in the sort of problem observed by Pollock; there is a diffuse aspect to Maine's ideas which makes it difficult to write about any single element in his works, such as law, without constant qualifications to statements of general principle and numerous references to other subjects. However, the attempt to respond to this in the chapters which follow is made easier by three modern studies which have done much to clarify various themes in Maine's writing as a whole. Peter Stein has provided an analysis of Maine's place in the development of ideas about 'legal evolution', and has alerted us to the latter's links with thinkers not usually thought of in the context of English jurisprudence.<sup>18</sup> John Burrow has located Maine's role in nineteenth-century theories of social evolution and, in doing so, has revealed the extent to which the latter was much more than a jurist.<sup>19</sup> George Feaver, in his study *From Status to Contract* has written a very useful life of Maine which explores many of his interests and relates them in detail to his background and experiences.<sup>20</sup> The present study provides its own interpretation of Maine's jurisprudence, but without Feaver's work it would have been much more difficult to place Maine's legal thought in the context of his

<sup>18</sup> P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge, 1980).

<sup>19</sup> J. W. Burrow, *Evolution and Society* (Cambridge, 1966).

<sup>20</sup> G. Feaver, *From Status to Contract* (London, 1969).

whole life; Feaver's *From Status to Contract* provides valuable support for more specialised studies of Maine's writing, whether they relate to law or anthropology or history or any of the other topics which concerned him.

#### MAINE'S LIFE

Maine's father was a doctor and this in itself gave his son a background quite unlike that of other Victorian jurists.<sup>21</sup> Pollock was born into a family which had already provided famous lawyers; Fitzjames Stephen's father was involved in the problems of government and law reform; Dicey's family was committed to public debate about political and constitutional matters.<sup>22</sup> When Maine was a young child in the 1820s it would have required an extraordinary act of imagination to suggest that his later thoughts would turn to the problems of English jurisprudence. In a sense he was an 'outsider' from the start.

Little is known of Maine's early years. His parents separated when he was young and his family circumstances were not happy. He was a delicate child, prone to illness, and this may have encouraged an introspective frame of mind and an interest in poetry. After early years at Henley-on-Thames he was sent to Christ's Hospital School where he was recognised as a promising pupil with an enthusiasm for literature. In 1840 he went to Cambridge as an Exhibitioner of Pembroke College and made an impression as a young classicist of unusual ability. He carried off numerous prizes and was the best classical scholar of his year. In 1844 he accepted a tutorship at Trinity Hall and began a sustained study of ancient laws and legal systems. Such was Maine's reputation at the university that as early as 1847, at the age of twenty-five, he was appointed to the Regius Professorship of Civil Law.

In retrospect, what followed has the appearance of untroubled achievement. Within a few years he had become a Reader at the Inns of Court in London and was providing courses for intending barristers. He also developed a strong interest in journalism; he wrote for

<sup>21</sup> The aspects of Maine's career which are mentioned in this section are considered in more detail in Feaver, *From Status to Contract*.

<sup>22</sup> Fitzjames Stephen's life and background have recently received attention in J. A. Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (London, 1983); Dicey has also been the subject of a helpful study in R. A. Cosgrove's biography, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London, 1980). Pollock awaits his biographer.

the *Morning Chronicle* and, after its establishment in 1855, for the *Saturday Review*. The latter in particular involved Maine in writing about legal matters such as the reform of the Inns of Court and political issues of general interest such as the abolition of the East India Company. In 1862, after the publication of *Ancient Law*, he went to India where, as legal member of the Governor-General's Council, he played a part in the development of new statutory laws for the subcontinent. By the end of the 1860s he had returned and become the Corpus Professor of Jurisprudence at the University of Oxford. He gave some remarkable courses of lectures to his students and after these were published they enhanced what was, by now, an international reputation as a jurist concerned not only with Roman Law but also with 'primitive law' and modern law in all of their respective forms. Maine's *Village Communities*, and *Early History of Institutions*<sup>23</sup> were produced at this time.

In 1878 he accepted an invitation to become the master of Trinity Hall, Cambridge, and in the following years he was notable chiefly for *Early Law and Custom*; a controversial political study called *Popular Government*; and his appointment as Whewell Professor of International Law.<sup>24</sup> However, throughout these later years, he also continued his journalism and even carried heavy administrative duties at the India Office in London where his advice was much respected. In 1887 his health deteriorated seriously and in 1888, at the age of sixty-six, he died. Soon afterwards his friends were allowed to set up a memorial to him in Westminster Abbey.

After his death the same friends were sometimes to speak of his personality in slightly mixed terms. They sympathised with him for the fact that his health was usually poor. They took pleasure in the extent to which he was a brilliant conversationalist, succinct and illuminating. No one ever doubted his loyalty as a friend, and after he married in 1847 his family circumstances seem to have become much happier although, obviously, much of the praise for this should be directed towards Jane, his wife. But throughout his adult life there was a reserve in Maine's manner which had an unpleasant aspect. In the words of Sir Leslie Stephen: 'To casual observers he might appear

<sup>23</sup> *Village Communities* (London, 1871); *Lectures on the Early History of Institutions* (London, 1875).

<sup>24</sup> *Dissertations on Early Law and Custom* (London, 1883); *Popular Government* (London, 1885). There was also a posthumous work, *International Law: The Whewell Lectures* (London, 1888), edited for publication by Frederick Pollock and Frederic Harrison.

as somewhat cold and sarcastic, but closer friends recognised both the sweetness of his temper and the tenderness of his nature.<sup>25</sup> He often engendered admiration rather than endearment.

Also, on closer analysis, the picture of uniform success in public life is misleading. As we will see, it conceals a strong sense of frustration towards the ideas of many of his fellow Victorians. In his twenties he believed that Cambridge was failing to provide a valuable form of legal education for its students; and when he went to London and gained some knowledge of legal work he soon developed a hostile attitude towards the Bar and its practices. During his years in Calcutta he had the consolation of knowing that *Ancient Law* had been very well received, but again there was much which left him dissatisfied. He gained little pleasure from attention to the minute details of law reform, and was frequently saddened by the inability of both European and Indian lawyers to recognise the need for very general changes in their respective approaches to legal problems. He always had difficulties in relating his adventurous ideas about law to the realities of life on the subcontinent.

When he returned in 1869 to the professorship at Oxford any hopes he still retained for changes in legal education were soon to vanish. A joint degree in law and history came to an end, and a degree in English law already showed signs of concentrating on the interpretation of certain statutes and cases rather than on issues associated with the development of law and the possibilities of reform. By the time of his (unexpected) election as master of Trinity Hall in Cambridge the practical irrelevance of much that he had written about law was becoming more and more obvious. The greater part of his writing after *Ancient Law* hardly related to the content of the new law degrees. He had achieved public eminence without seeing the substance of any of the educational reforms which he had tried to obtain.

These difficulties were compounded throughout his life by political problems. He wrote numerous articles on political topics and all of them were committed to a radical, reforming conservatism. He was openly elitist and distrusted all extensions of the franchise. But he believed just as strongly in the abolition of any anachronisms which perpetuated inefficient practices and encouraged popular resentment. Since Maine included most legal institutions and the greater part of the common law in the latter category his ideas were, once again, likely to produce the sort of resentment which could cause him severe

<sup>25</sup> *The Dictionary of National Biography* (London, 1903).

difficulties. Yet developments in legal and political thought made him almost intransigent in his later years. In response to what he saw as the very damaging introduction of the vote for all adult males there was (as he saw it) an equally damaging attempt to glorify the past. By the 1880s the common law was becoming more popular in public debate than it had been for half a century. Instead of an interest in radical measures which could preserve 'property' in a new age there was respect for inappropriate traditions. It was no wonder that he 'often appeared to be rather a spectator than an actor in affairs';<sup>26</sup> few events engaged his enthusiasm.

All of these educational and political problems were joined by many others in the course of Maine's life, and one of the purposes of the present study is to show how they provide a better guide to his jurisprudential work than the apparent account of one success followed by another. Maine's work is of value today, but it has to be explained by reference to the nature of Victorian legal thought and the specific opportunities which confronted him.

<sup>26</sup> *Ibid.*