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Maurice Hauriou's Theory of the Institution: Legal Institutionalism and the Science of the State[2]

1. Introduction

A closer look at historical disputes in the field of philosophy and theory of law can contribute to a better understanding of contemporary approaches to law and foster a reflexive revision of the concepts used in legal science. In this paper, I would like to focus on the critical thought of Maurice Hauriou (1856–1929), a French theoretician of law and author of the institutional theory of law. His works appear today as an eminent and instructive example of the "laboratory of modernity" at the turn of the 19th and 20th centuries marked by the emergence of the modern social sciences and positivism. His concepts of state and law, a fruit of almost forty-years long research, seem also to be an important illustration of scientific reflexivity as a continuous, imperfect, and self-conscious work of critical observation of reality.

Hauriou was a professor of public law at the University of Toulouse. Fascinated by disciplines such as biology, physics, psychology, and social sciences,[3] he was himself a researcher of a double socio-legal background. Yet, after some attempts of working in the field of theoretical sociology in his early career,[4] he decided to dedicate himself to legal science. Today Hauriou is mostly renowned for his works in the field of public law such as *Précis de droit administrative* (1892),[5] *Principes de droit public* (1910),[6] or *Précis de droit constitutionnel* (1923)[7] and is considered to be the father of the administrative law science in France. His approach to legal science distinguished itself by a purposive and critical attempt to combine doctrinal jurisprudence with historical analysis and sociology, the transposition of which to legal science remains a crucial element

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[3] P. Arabeyre, J.-L. Halpérin (eds.), *Dictionnaire des juristes français (XIIe–XXe siècle)* [Eng. *Dictionary of French Lawyers (12th–20th century)*], Paris 2007, pp. 516–519.
[4] M. Hauriou, *La science sociale traditionnelle* [Eng. *Traditional Social Science*], in: M. Hauriou, *Écrits sociologiques* [Eng. *Sociological Writings*], Paris 2008, pp. 1–432; M. Hauriou, *Leçons sur le mouvement social* [Eng. *Lessons on Social Movement*], in: M. Hauriou, *Écrits*…, pp. I–VIII and 1–176.
[5] M. Hauriou, *Précis de droit administratif et de droit public* [Eng. *Textbook of Administrative and Public Law*], Paris 2002.
[6] M. Hauriou, *Principes de droit public* [Eng. *Principles of Public Law*], 1st edition [reprint], Paris 2010.
[7] M. Hauriou, *Précis de droit constitutionnel* [Eng. *Textbook of Constitutional Law*], Paris 2015.

of his work.[8] By this Hauriou intended to contribute to the project of methodological renewal of legal science at the end of the 19th century.[9] Already in his article published in 1893, *Les facultés de droit et la sociologie*,[10] he argued that social sciences should not only by an auxiliary for jurisprudence, but also that the empirical research on law in the social context – especially on its history – should constitute a legitimate method of legal science going beyond mere analysis of statutory law,[11] what he explored in detail in his paper on external sources of law (*L'histoire externe du droit*).[12] Hauriou's attachment to sociology is clearly visible in his probably most cited phrase: "a little sociology detracts from the law, a lot leads back it"[13] as a necessary remedy to shortcomings of written law in the domain of public law at that time.[14]

What deserves to be highlighted is that Hauriou's institutionalism came out mainly as a critical theory, even if nowadays it may not appear as such. From this perspective, one of the main objectives of institutionalism was to tackle the ontological nature of law and to reconcile the extreme positions of objectivism and subjectivism in legal theory. Regarding subjectivism, Hauriou's criticism focused on the German statist doctrine developed *inter alia* by Paul Laband, Carl von Gerber, and Georg Jellinek. Their theories, known as the *Herrschaft* doctrine, based on ontological voluntarism, in Hauriou's view unjustifiably reduced the concept of legal sources to the mere individual acts of will of competent state authorities establishing the positive law. Hauriou's main reproach with regard to this doctrine was focused on the shortcomings of the direct transposition of private law concepts such as, for instance, legal personality or contract, to the science of the state as amounting to a pure abstract thinking.[15] The criticism of subjectivism in legal science was also, according to Hauriou, a necessary step to re-establish a stable theory of public authority after the French revolution. As it will be demonstrated afterwards, Hauriou's institutionalism largely questioned the revolutionary doctrine of representation of national sovereignty equating the general will with the will of the state (even if representative) powers and rejecting the customary nature of law.[16]

With regard to legal objectivism, Hauriou's theory was conceived as a fierce criticism of the normative approach to law, especially Hans Kelsen's normativism qualified by Hauriou as "ultra-objective" due to the fact that it was based on a complete detachment of legal reasoning from any social context. However, Hauriou's opposition against objectivism also concerned, on the other hand, theories based on pure

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[8] L. Sfez, *Essai sur la contribution du doyen Hauriou au droit administratif français* [Eng. *Essay on the Contribution of the Dean Hauriou to the French Administrative Law*], Paris 1966, p. 181ff; F. Auden, M. Millet, *Préface. Maurice Hauriou sociologue* [Eng. *Preface. Maurice Hauriou – Sociologist*], in: M. Hauriou, *Écrits*..., p. LVI.

[9] Cf. Ch. Jamin, *Dix-neuf cent: crise et renouveau dans la culture juridique* [Eng. *20th Century: Crisis and Renewal of the Legal Culture*], in: D. Alland, S. Rials (eds.), *Dictionnaire de la culture juridique* [Eng. *Dictionary of Legal Culture*], Paris 2003, pp. 380–382.

[10] M. Hauriou, *Les facultés de droit et la sociologie* [Eng. *Faculties of Law and Social Science*], in: M. Hauriou, *Ecrits*…, p. 5.

[11] F. Auden, M. Millet, *Préface*..., p. VIII.

[12] M. Hauriou, *L'histoire externe du droit* [Eng. *External History of Law*], Paris 1884, p. 5ff; J.-A. Mazères, *Préface* [Eng. *Preface*], in: J. Schmitz, *La théorie de l'institution du doyen Maurice Hauriou* [Eng. *The Theory of the Institution of Dean Maurice Hauriou*], Paris 2013, p. 11.

[13] M. Hauriou, *Les facultés*..., p. 4.

[14] O. Beaud, *Doctrine* [Eng. *The Doctrine*], in: D. Alland, S. Rials (eds.), *Dictionnaire*..., p. 386.

[15] M. Millet, *La doctrine juridique pendant la Guerre: à propos de Maurice Hauriou et de Léon Duguit* [Eng. *The Legal Doctrine During the War: Notes on Maurice Hauriou and Léon Duguit*], "Jus Politicum" 2016/15, http://juspoliticum.com/article/La-doctrine-juridique-pendant-la-Guerre-a-propos-de-Maurice-Hauriou-et-de-Leon-Duguit-1087.html, accessed on: 22 June 2022.

[16] M. Loughlin, *Droit politique* [Eng. *Political Law*], "Jus" 2017/17, http://juspoliticum.com/article/Droit-politique-1129.html, accessed on: 22 June 2022.

sociological empirism. His main scientific adversary in this context was Léon Duguit (1859–1928), a professor of public law at the University of Bordeaux with whom he, in the words of Marc Millet, "largely dominated the science of public law" under the Third French Republic and determined future doctrines of public law in France.[17] Duguit's theory was, as well, fundamentally opposed to normativism and based on the concept of objective law (*droit objectif*) which can only be analysed through sociological, positivist study of social practices, with an almost complete departure from positive law analysis. Hauriou criticized Duguit's theory by affirming that the application of social sciences in law should not amount to complete abstraction, radical social determinism or absolute reductionism subjecting the law to sociology. Instead, Hauriou intended to combine subjectivism and objectivism in both ontological and epistemological assumptions of his theory. This paper aims, in the vein of critical source analysis, to present Hauriou's theory as one of the most coherent and comprehensive examples of legal institutionalism. The paper will focus on the article *La théorie de l'Institution et de la fondation. Essai de vitalisme social* (1925)[18] in which Hauriou intended to present a final *résumé* of his theory, the outlines of which had already been drawn in his previous texts such as the *Principes de droit public*[19] or *Précis de droit constitutionnel.*[20] The core of the paper focuses on the analysis of the criticism expressed by Hauriou in his theory towards theoretical concepts and legal doctrines which were contemporary to him.

2. An outline of Hauriou's institutionalism

2.1. The definition of the institution and its key notions

According to the last version of the definition of 1925:

> the institution is an idea of a work or an enterprise, which is realized and continues to be realized in the social environment; for this idea, a certain authority is organized which provides for its organs; on the other hand, among the following members of the social group interested in the realization of this idea the community manifestations are held, led by the authorities and regulated by the procedures.[21]

Later in the text Hauriou distinguishes between "institutions-persons" (*institutions-personnes*) and "institutions-things" (*institutions-choses*) and focuses on the first category, defining them as active "constituted bodies" (*corps constitués*).[22] As for institutions--things, they are to be considered as a secondary (static) product of the activity of institutions-persons in time (for example positive law acts). What is crucial is that Hauriou conceived institutions as social organisations which are permanent and produce within them, by their very nature, "legal situations" that last in time.[23] It is also worth a mention

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17 M. Millet, *La doctrine*...

18 M. Hauriou, *La théorie de l'institution et de la fondation. Essai de vitalisme social* [Eng. *The Theory of the Institution and the Foundation. Essay on Social Vitalism*], in: M. Hauriou, *Aux sources du droit. Le pouvoir, l'ordre et la liberté* [Eng. *At the Sources of Law. Power, Order and Freedom*], "Cahiers de la Nouvelle Journée" 1933/23, pp. 89–128 [reprint from 1925].

19 M. Hauriou, *Principes de droit*…, 1st edition.

20 M. Hauriou, *Précis de droit constitutionnel*...

21 M. Hauriou, *La théorie*…, p. 96.

22 M. Hauriou, *La théorie*…, pp. 96–97.

23 J.-A. Mazères, *Réflexions sur une réédition: "les Principes de droit public" de Maurice Hauriou* [Eng. *Reflexions on a Republication: Maurice Hauriou's 'Principles of Public Law'*], "Jus Politicum" 2011/6, http://juspoliticum.com/article/Reflexions-sur-une-reedition-les-Principes-de-droit-public-de-Maurice-Hauriou-370.html, accessed on: 22 June 2022.

that, according to Hauriou, every particular institution is always to be seen as a part of a wider, composed, and dynamic social order.

The most crucial element of the definition of the institution is "the idea of a work or an enterprise". In fact, according to Hauriou, the institution is the idea itself as its subject which defines its identity and directs the activity of its members. From this perspective, the analysis of every institution needs to start with the concept of a work or enterprise meant to be implemented by them. It is worth mentioning that in later fragments Hauriou consistently used the term "guiding idea" (*idée directrice*), which better reflects the intentions of the author because, as he emphasized, the guiding idea is something different from the purpose (*but*) or the function of the institution, i.e., notions that rely too much on a particular and present-day situation which may, in consequence, vary in time.[24] Hauriou compares the concept of the guiding idea rather to the concept of the object of an enterprise (*objet*) which is in part already defined and, in part, based on a potentiality.

With regard to this Hauriou stressed that it is all those who belong to the "group interested in the realization of an idea" (i.e., members of the institution) who participate in the perception of the guiding idea and its progressive determination and realization. Thus, as far as the state is concerned, it is for all its citizens to participate in the political process and shape common policies together with their own representations of the idea of community and law and the values associated with them. This process, as Hauriou himself wrote, is of an "interpsychological" nature,[25] which resonates well with contemporary terms of intersubjectivity or even discourse theories of law.[26] This process is referred to by Hauriou also under the concept of the "manifestations of community", which was meant to underline the importance of repetitive procedures and collective actions for the functioning of institutions as sustainable representative organisations. As Hauriou claims in *Principes de droit public*, the element of manifestations is vital for the institution as "it makes from an assembled crowd a group of individuals who are similar enough to be able to think together and in a similar way".[27] Hauriou's understanding of the concept of the guiding idea was largely determined by Gabriel Tarde's idea of "law of imitation" based on continuity of social interactions.[28] The concept of the guiding idea seems also to be a distinctive feature of Hauriou's theory among other institutional theories of law as pointing out to the phenomena that can be reached by social and political scientific research as something observable in the societies' actions and traditions but which, on the other hand, has a more general purpose which goes beyond individual social conditioning. It is a perspective that has not been followed by other institutionalist, nor, for example, by Neil MacCormick (1941–2009) and Ota Weinberger (1919–2009) who viewed institution as a specific setting of arrangement of social relations.

What is probably the most crucial and what distinguishes Hauriou's institutionalism as a legal theory is the concept of the "foundation" of institutions, through which

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[24] M. Hauriou, *La théorie*..., pp. 98–99.

[25] M. Hauriou, *La théorie*..., p. 99.

[26] E. Millard, *Hauriou et la théorie de l'institution* [Eng. *Hauriou and the Theory of the Institution*], "Droit et société" 1995/30–31, p. 395.

[27] M. Hauriou, *Principes de droit public* [Eng. *Principles of Public Law*], 2nd edition, Paris 1916, p. 222.

[28] J. Barroche, *L'argument sociologique chez Maurice Hauriou* [Eng. *Sociological Argument in Maurice Hauriou's Works*], in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, [Eng. *The Thought of Dean Hauriou in the Test of Time: What Legacies?*], Aix-en-Provence 2015, pp. 58–59; see also: J.-A. Mazères, *Réflexions*...

Hauriou intended to insist on the dynamic nature of establishment of institutions based on the idea of continuity (*durée*). This was strictly opposed to legal subjectivism, normativism and positive law analysis which focuses on statical analysis of individual legal acts. As such, in Hauriou's view, institution is first and foremost a process and has to be seen as a collective work of practice, perpetuation and determination of certain common ideas. The involvement of the whole community in the institutional process shifts the foundation of the institution from the notion of the power of social acceptance and consolidation over time.[29] This understanding of institution was largely inspired by the concept of the institution under the French sociological school of Emile Durkheim (1858–1917) and works of Marcel Mauss (1872–1950) based on the idea of power of external coercion of social institutions on individuals as a set of established acts or ideas which individuals encounter and which impose themselves on them to a greater or lesser extent.[30] Nevertheless, Hauriou's theory is far from a simple translation of these concepts and insists more on the dynamic character of founding of the institutions as a process.

2.2. The institutional concept of law and legal pluralism

The concept of the institution described above has several particularly important consequences for Hauriou's approach to law. The most crucial is the thesis of legal pluralism according to which legality is not an exclusive domain of the state but belongs to "multiple institutions whose complex relations of power and balance compose the social structure".[31] According to Hauriou, as indicated above, every social institution creates its own legality which is independent from the established and recognized positive state law. This legality is composed of two types of law: a *droit statuaire* regulating the organisation of a given social group, and *droit disciplinaire* addressed to their members as individuals, which mediates institution's action on the society by use of coercion.[32] As claimed by Eric Millard, Hauriou's version of legal pluralism is quite radical and can be even described as an "anarchic theory of law" as it blurs the traditional approach to law by refusing the idea of legality as a monopoly of one social institution and questions the state's exclusive authority with regard to law.[33] The latter is, however, relativised only to some extent as Hauriou clearly underlined the difference between the state and other institutions as a particular category of the "institution of the institutions" (*institution des institutions*), with the idea of establishing a general legal order among all of them.[34] Nevertheless, this special, historically established position of the (nation) state is, according to Hauriou, never to be considered immutable.

Secondly, apart from the pluralist thesis, the important claim of Hauriou on the ontological nature of law is its secondary character with regard to institutions themselves. As far as positive law acts are concerned, Hauriou conceives them as "institution-things" which are, as indicated above, only mere products of institutions' action

[29] M. Loughlin, *Droit politique*...

[30] P. Fauconnet, M. Mauss, *Sociologie*, in: *la Grande Encyclopédie*, Vol. 30, Paris 1901, pp. 165–175.

[31] J.-A. Mazères, *Réflexions*...

[32] D. Terré, *Le pluralisme et le droit* [Eng. *Pluralism and Law*], "Archives de la philosophie du droit" 2005/49, p. 76.

[33] E. Millard, *Pluralisme juridique* [Eng. *Legal Pluralism*], speech at the conference *Théorie du droit pour tous* [Eng. *Legal Theory for Everyone*], 13 January 2021, Université Paris-Nanterre.

[34] M. Hauriou, *Précis de droit administratif*..., p. IX; J. Barroche, *Maurice Hauriou, juriste catholique ou libéral?* [Eng. *Maurice Hauriou, Catholic or Liberal Lawyer?*], "Revue Française d'Histoire des Idées Politiques" 2008/2, p. 328.

and they can never be equated with real, original social sources of legality as such.[35] This social legality is, according to him, not "properly juridical", but "primary moral or intellectual",[36] often referred to under the term of "general principles of law".[37] These principles have been expressed either in the form of customary law, declarations or bill of rights which stipulate the most fundamental rules of the social order and constitute a "supra-legality" (*superlégalité*).[38] The application of this *prima facie* non-legal category to legal practice may raise doubts. However, it is on the basis of this theory that Hauriou coined the concept of the "block of legality" (*bloc de légalité*) which inspired the future Louis Favoreu's concept of the "bloc of constitutionality" (*bloc de constitutionnalité*) incorporated in today's French Constitutional Council case law.[39] Such approach can also be seen in the jurisprudence of many international courts, in particular that of the Court of Justice of the EU and its use of the concept of the general principles of EU law as an example of a socially recognized normativity "which is not exhausted in constitutional text".[40] This approach is, for the rest, quite similar to the Duguit's concept of social legality but differs importantly from it due to the assumption of an objective existence of these principles, thus allowing some to qualify Hauriou's institutionalism as a peculiar version of the natural law theory. This assumption is, however, neutralised by Hauriou's concept of "established law" under which law is inherently of a customary nature. Under his theory, the positive law is therefore to be regarded as "established" and valid only if it has become a custom, regardless of its expression in written law which is only a "provisional", brute source of legality, even if it originates from some representative organs of power.[41]

However, in order to precisely capture Hauriou's concept of law, it must be underlined that what he meant as customary was not that much a question of social form of legality based on practice and repetitiveness (which would be similar to Duguit's theory), but rather of the legitimacy of the institutions which create the law. This is linked to one of the most important concepts in Hauriou's theory, namely that of the "adherence" (*adhésion*) which was meant to replace the concept of a social contract. According to Hauriou, the fallacy of contractualism consists in the fact that it presumes the existence of an ideal, abstract contractual situation at the source of law. Such a concept is, arguably, purely fictional, ahistorical, and reduces the basis of legitimacy of law to an individual and isolated act of constitutional or electoral operation of founding.[42] According to Hauriou, in fact, the legitimacy of power can hardly ever be associated with a full consensual agreement and needs to be anchored in an institution which is something durable. Its real nature can rather be described in terms of the above-mentioned "adherence", i.e., passive recognition and acceptance of the political and legal order of a given institution (state) expressed through participation in procedures

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35 M. Hauriou, *Aux sources du droit*…, pp. 96–97.

36 M. Hauriou, *Aux sources du droit*…, p. 117.

37 M. Loughlin, *Droit politique*...

38 See the concept of *supralégalité constitutionnelle* [Eng. *Constitutional Supralegality*], in: M. Hauriou, *Précis de droit constitutionnel*..., p. 258.

39 A. Roblot-Troizier, *Le Conseil constitutionnel et les sources du droit constitutionnel*, "Jus Politicum" 2018/21, http://juspoliticum.com/article/Le-Conseil-constitutionnel-et-les-sources-du-droit-constitutionnel-1261.html, accessed on: 22 June 2022.

40 T. Tridimas, *Foreword*, in: T. Konstadinides (ed.), *The Rule of Law in the European Union: The Internal Dimension*, Oxford 2017, p. VI.

41 M. Hauriou, *Principes de droit*…, 2nd edition, p. XVIff.

42 M. Hauriou, *Principes de droit*…, 1st edition, pp. 204–205.

established by the latter. Yet, the laws which enjoy the highest level of social (explicit or implicit) acceptance constitute what he called "the perfect law" (*droit parfait*), which reflects a thesis of an inherent hierarchy of legal rules.[43] Again, such concept may easily be qualified as going counter the legal certainty and inoperative. Hauriou clarified, however, that "adherence", as a mark of legality, is not an "acceptance by the subjects of the acts' dominant force, because there can be a resistance against these acts, but rather a consent to sustain the institution despite of the acts of its executive organs", which again neutralizes the radicality of Hauriou's assumptions.[44]

2.3. Ontological and epistemological assumptions of the institutional theory

In the ontological aspect, according to Hauriou's explicit declaration, institutionalism was meant to be a synthesis of the doctrines of legal subjectivism and objectivism. The institutional concept of law is therefore not easy to qualify in frames of clear-cut distinctions between different theories of general philosophy, and represents more of a "syncretic" approach to law.[45] What is more, the elements of Hauriou's synthesis of different ontological assumptions on the nature of law were not limited to the mere criticism doctrines of legal objectivism and subjectivism. Hauriou's theory is more accurately to be analysed as a changing, reflexive and never completed work, where many different philosophical inspirations were included in different periods of its development. The two main Hauriou's philosophical inspirations were, on one side, the Auguste Comte's scientific positivism, explored by him under the concept of the laws of social movement, as well as Gabriel Tarde's idea of the law of imitation, and, on the other hand, the idealism (or even spiritualism)[46] related to his fascination with Catholic Social Teaching and neo-thomism which can be seen both in the assumption of objective existence of ideas and social values but also in Hauriou's attentiveness towards corporative character of the social order.[47]

As regards Hauriou's insistence on historical analysis and diachronical concept of constitution of legal orders, Georg W.F. Hegel's philosophy might have had some impact on institutional theory although, despite many affinities between them, this context remains unclear.[48] However, taking into consideration the importance of the category of duration (*durée*) and continuity, as well as a few explicit mentions made by Hauriou, the institutional theory is more likely to have been inspired by Henri Bergson's vitalism, especially by the concept of the organic social movement driven by an immaterial force called as *élan vital*,[49] transposed by Hauriou in his claim of dynamic realization of ideas by positive actions of institutions in the society. This allowed Hauriou to make an important contribution to legal philosophy by developing a concept of law which could go beyond mutually exclusive dialectics of both subjectivism and objectivism, as well as between legal positivism and the concept of law as a process.[50] Thus, Hauriou created

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43 M. Hauriou, *Principes de droit*…, 1st edition, p. 649.
44 M. Hauriou, *Principes de droit*…, 1st edition, p. 135 ; cit. after: J.-A. Mazères, *Réflexions*..., p. 14.
45 J.-A. Mazères, *Réflexions*...
46 See: J. Schmitz, *La théorie*..., p. 247ff.
47 E. Millard, *Hauriou*…, p. 390ff.
48 J. Jiang, *Hauriou, hégélien malgré lui?* [Eng. *Hauriou, Hegelian in Spite of Himself?*], in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., p. 115ff.
49 J. Schmitz, *La théorie*..., p. 61, p. 269ff.
50 J. Schmitz, *La théorie*..., p. 407.

a unique, syncretic, non-strictly naturalist approach to law which insists on intersubjective character of the creation of law, which can be compared, for example, to Karl Mannheim's "perspectivism".[51] Due to such syncretism and indeterminacy, Hauriou's theory is interchangeably described in categories of a sociological theory, naturalist positivism,[52] idealism, or finally as an *ideal-realism*.[53]

Regardless of the extent to which such syncretism might seem inoperative or unintelligible, there is, however, some clarity in the way in which Hauriou makes quite rigid distinction between ontological assumptions of his theory and epistemological observations on the legal methodology that accompany them. It is precisely because Hauriou, as claimed by Yann Tanguy, was "far from abstraction, focused on action" and wanted to build his theory in a way which could be useful for practice.[54] Therefore, notwithstanding the ontological idealism, the methodological observations that he advanced were quite positivist and based on descriptivism or even materialism; yet, with a special insistence on the priority of historical analysis linked to continuity in law.[55] However, it is often claimed as well that the institutional concept of legal methodology remained firmly rooted in the conceptual repertoire of the earlier legal science tradition and was limited only to some observations borrowed from the general theory of social sciences. As concluded by Julien Barroche, Hauriou has *never converted to sociology* for real.[56] Therefore, the inclusion of sociology within the theory of the institution may seem rather "accessory" or even "instrumental" in opposition to Duguit's radically (declarative) sociological approach to legal methodology.[57]

3. Hauriou's institutionalism and the science of the state

Hauriou's theory of the institution with its critical approach to the very foundation and the nature of law provides for numerous interesting observations on the concepts used in the science of public law and the theory of the state. Although almost a hundred years have now passed since the publication of Hauriou's final work precising his theory, his claims seem vividly up to date today, when the notions of the state, sovereignty or constitutionalism are being fundamentally challenged by ever increasing pluralism of legal orders.

3.1. Institutional reading of the concept of sovereignty

Regarding the concept of the sovereignty, legal institutionalism was conceived as an opposition against the German *Herrschaft* doctrine based on the idea of voluntarism and subjective personality of the sovereign state, where the sovereignty itself was

[51] J.-A. Mazères, *Réflexions*...

[52] J. Barroche, *Maurice Hauriou*..., p. 315.

[53] G. Gurvitch, *Les idées – maîtresses de Maurice Hauriou* [Eng. *The Ideas – Mistresses of Maurice Hauriou*], "Archives de philosophie du droit et de sociologie juridique" 1931/1–2, p. 155.

[54] Y. Tanguy, *L'institution selon Maurice Hauriou: doctrine et postériorité* [Eng. *The Institution According to Maurice Hauriou: Doctrine and Posteriority*], in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., p. 303ff.

[55] M. Doat, *Durée et droit chez Maurice Hauriou* [Eng. *Duration and Law in Maurice Hauriou's Works*], in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., pp. 419–420.

[56] J. Barroche, *L'argument sociologique*..., p. 47.

[57] P.-M. Raynal, *Révolution et légitimité, la dimension politique de l'excursion sociologique du droit constitutionnel* [Eng. *Revolution and Legitimacy. The Political Dimension of the Sociological Excursion in Constitutional Law*], "Jus Politicum" 2012/7, http://juspoliticum.com/article/Revolution-et-legitimite-la-dimension-politique-de-l-excursion-sociologique-du-droit-constitutionnel-467.html, accessed on: 22 June 2022.

reduced to the mere expression of the will of state authorities. That was, of course, distinctly contrary to the assumptions of legal institutionalism presented above.[58] Hauriou reproached those statist theories for having oversimplified the concept of sovereignty by qualifying it as essentially uniform and indivisible in the spirit of the "the sovereignty is or is not" principle.[59] Instead, Hauriou perceived sovereignty as being inherently divided and appertaining to the society with its all inner corporative structures where any kind of institution, state authorities included, are external to it and can never be considered fully and exclusively sovereign. Such concept expressed a strong criticism against the doctrine of national sovereignty inherited from the Enlightenment and the political theory of the French revolution which, in Hauriou's view, attributed sovereignty to a (mystical) electoral representation of the society, leading back to the idea of monopoly and centralization of power which contradicts the very idea of individual liberty.[60] Instead, in his theory Hauriou questioned the very status of electoral power exercised by the people by underlining that their opinion can never be equated with the general social adhesion to the institution of the state and its actions and qualified it as "electoral will" (*volonté électorale*).[61] From such perspective, Hauriou's theory insisted more on the necessity to provide for a representative system (*régime représentatif*) of an open and inclusive law-making process, giving voice – institutionally – to a plurality of wills that are possible in a given society.[62]

As for the concept of sovereignty, Hauriou argued that the idea of political liberty

> "implies that the nation, with consideration taken of all its objective particles, should have a share in the sovereignty and that this sovereignty should be exercised not only by central government bodies but also by minor bodies of the social organization down to every ordinary citizen".[63]

In consequence, sovereignty should be conceived more exactly as a collective expression of a compound will (*volonté composite*).[64] What is particularly important is that Hauriou's theory reverses the scheme of the doctrine of delegation of power by asserting that the nation does not exist prior to the state which puts it in an organised political frame and the state acts can, therefore, only be legitimized *a posteriori* via a constant, and not punctual, process of expression of social acceptance and obedience to these acts.[65] Therefore, criticizing the radical democratic doctrines insisting on the importance of electoral processes, still present today for example in Jeremy Waldron's works, Maurice Hauriou turns to the concept of adherence, mentioned above, as the most important source of sovereignty.[66] Such concept, especially with regard to its consequences on the status of electoral power, represents an elitist view on democracy, which was later radicalized by Carl Schmitt.[67] This criticism seems also quite contemporary in the context

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[58] M. La Torre, *Constitutional and Legal Reasoning*, Dordrecht 2007, pp. 17–20.

[59] M. La Torre, *Constitutional*…, pp. 17–20.

[60] M. Loughlin, *Droit politique*...

[61] M. Hauriou, *Précis de droit constitutionnel*..., p. 553ff; B. Daugeron, *De la volonté générale à l'opinion électorale: réflexion sur l'électoralisation de la volonté collective* [Eng. *From the General Will to the Electoral Opinion. A Reflexion on the Electoralisation of the Collective Will*], "Jus Politicum" 2013/10, http://juspoliticum.com/article/De-la-volonte-generale-a-l-opinion-electorale-reflexion-sur-l-electoralisation-de-la-volonte-collective-756.html, accessed on: 22 June 2022.

[62] M. Hauriou, *Principes de droit*…, 2nd edition, p. 118.

[63] M. Hauriou, *Principes de droit*…, 2nd edition, p. 608.

[64] M. Hauriou, *Principes de droit*…, 1st edition, p. 424ff.

[65] M. Loughlin, *Droit politique*…

[66] As an expression of a "sovereignty of ideas" which manifest themselves though citizens' individual representations thereof.

[67] O. Beaud, *La puissance de l'État* [Eng. *The Power of the State*], Paris 1994, p. 293.

of the debates in constitutional law science on how democracy and liberal foundations of constitutionalism can sometimes turn out to be mutually exclusive.[68]

3.2. The state and the separation of powers under Hauriou's institutionalism

Interestingly, following his concept of the sovereignty, Hauriou was plainly opposed to the idea that any kind of social institution or organ could claim absolute primacy, or even the electoral body of all citizens gathered in constitutional assemblies, usually considered the highest instance of democratic power, should be conceived as constituted political bodies which are separate from the society itself.[69] This was, according to Hauriou, natural and inevitable as no action can ever result directly from an unorganized mass of individuals, but is always a domain of some (political) minoritarian milieu.[70] This view on democracy lies behind Hauriou's concept of the separation of powers according to which the power has to be exercised simultaneously by all the organs of the institution in order to secure the pluralism of perspectives on socially important issues.[71] By this Hauriou aimed to criticize the classic Montesquieu's concept as artificial and purely structuralist and claimed that the core of separation of powers lies in the rule of balance and cooperation of powers and not in their separation from each other.[72]

The originality of the principle of separation of powers in Hauriou's theory consists, firstly, in the fact that it is based on the form of action and not on their function.[73] This flows from his observation that in order to allow for a representative system to be truly established, no authority should be allowed to claim any (sovereign) monopoly of competence in a given field. Therefore, in his redefined version of the separation of powers, Hauriou distinguished – according to the form in which their will is expressed – between the deliberative power (*pouvoir délibérant*), i.e., discussing policies in general terms and adopting resolutions; the executive power (*pouvoir exécutif*), i.e., acting in the form of a decisions; and the electoral power (*pouvoir de suffrage*), i.e., acting in the form of consent (*assentiment*) acceptance.[74] Such definition of power echoes Hauriou's concept of legality as a process, where establishing law process is not exhausted in individual, instant acts but consists of a complex process of cooperation between different social instances.[75] Moreover, Hauriou's version of separation insisted on a balance including also non-political powers, such as economical, religious, military and civil society forces because, as he claimed, "the political organisation of the state is strictly linked to the legal organisation of the nation to the extent that the state is constituted by the totality of legal situation rather than governmental or administrative systems".[76] Last but not least in this context, what might be easily missed by some less attentive readers, is that

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[68] K. Kaleta, *Władza konstytuująca jako przedmiot badań nauk prawnych* [Eng. *Constituent Power as a Subject of Legal Studies*], "Filozofia Publiczna i Edukacja Demokratyczna" 2018/1, p. 42.

[69] M. Hauriou, *Principes de droit*…, 2nd edition, p. 649.

[70] M. Hauriou, *Principes de droit*…, 2nd edition, p. 591.

[71] On the contrary, the political system which does not ensure the primacy of the idea before the will of the rulers, yet is socially recognized, would be qualified by Hauriou as a "factual government" (*gouvernement de fait*).

[72] E. Millard, *Hauriou*…, p. 395ff.

[73] Ph. de Lara, *La découverte de l'administration chez Maurice Hauriou* [Eng. *The Discovery of the Administration in Works of Maurice Hauriou*], "Jus Politicum" 2011/6, http://juspoliticum.com/article/La-decouverte-de-l-administration-chez-Maurice-Hauriou-372.html, accessed on: 22 June 2022.

[74] M. Hauriou, *Précis de droit constitutionnel*…, p. 348ff.

[75] Ph. de Lara, *La découverte*...

[76] M. Hauriou, *An Interpretation of the Principles of Public Law*, "Harvard Law Review" 1918/6, pp. 813–821.

the judicial authority is not mentioned among Hauriou's separated powers. This is precisely because the institutional theory of law accords the judge a special status of power exercised by an individual instance of a last-resort arbiter deciding on the balance between the powers and forces present in the society.[77] Following his strong criticism towards legal subjectivism, Hauriou was favourable, in this context, to the judicial constitutional review of statutes, as clearly expressed in *Précis de droit constitutionnel* and in his contribution to the debate on the *Ratier* case in 1924 concerning the annulment of the statue on the investigatory powers of parliamentary commissions.[78]

3.3. Institutional concept of the constitution

Another interesting contribution of Hauriou's theory to the science of public law is his definition of the constitution and his perspective on constitutionalism, often referred to as "constitutional realism".[79] Firstly, quite noteworthy, in opposition to legal positivism and voluntarism, in particular to the seminal works of Sieyes', Jean-Jacques Rousseau and Raymond Carré de Malberg in this domain, Hauriou argued that constitution is not a perfect, positive legal act but a certain state of social order where legal texts and practices only "make visible" some socially established fundamental principles governing the functioning of public powers. The particularity of Hauriou's concept lies especially in the focus on the processual nature of constitutional law based on the continuity of the foundation of public order based on continuous redefinition of the balance between "conservative" and "revolutionary" forces in the society.[80] The reality of this continuity demonstrates a certain legality which is binding on all public institutions and powers. The radicality of Hauriou's point in this matter lies in the fact that it fundamentally questions the very basic concept of "original constituent power" (*pouvoir constituant originaire*) by asserting that even the direct (positive) act of self-constitution of the nation, usually considered to be unconditionally sovereign and unbound, never operates in a legal void and has to obey to some pre-constitutional principles which are historically observable.[81]

The most crucial element of Hauriou's concept of constitutional law is the distinction between what he called a "social constitution" (*constitution sociale*) and "political constitution" (*constitution politique*) as his original version of the doctrine of supra-constitutionality (*superlégalité constitutionnelle*) which would not be strictly linked with the idea of natural law. This distinction, according to Hauriou, is based on the idea of duality of a legality anchored in customary, stable principles of law (that find their expression in positive law act such as declarations of rights) based on the idea of individual liberty that legitimizes, guides and conditions a more concrete, yet passing and changing legality of acts on the organisation of public institutions. This first legality covers "all norms, be it of positive law or of sociological nature, that structure civil

[77] M. Deguergue, *Les standards et directives et le rôle du juge dans la protection des droits chez Maurice Hauriou* [Eng. *Standards and Directives and the Role of the Judge in the Protection of Rights in Maurice Hauriou's Works*], in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., pp. 577–591.

[78] See: C. Węgliński, *Ciągłość konstytucyjna Republiki na tle przemian ustrojowych we Francji* [Eng. *Constitutional Continuity of the Republic through Changes of Political Regimes in France*], in. K.J. Kaleta, M. Nowak, K. Wyszkowski (eds.), *Konstytucyjne interregnum. Transformacje porządków prawnych* [Eng. *Constitutional Interregnum. Transformations of Legal Orders*], Warszawa 2019, p. 23.

[79] Term coined by Olivier Beaud, cit. after: Ph. de Lara, *La découverte*...

[80] Ph. de Lara, *La découverte*...

[81] O. Beaud, *Puissance de l'Etat*..., p. 264.

society and safeguard private autonomy"[82] and which, according to Hauriou, are based on the idea of precedence of liberty and equality which are "placed above all other rights" and limit the power of political institutions.[83] The idea of social and political constitution establishes, therefore, a clear hierarchy between substantial rules, on the one hand, and arrangement of power between public institutions on the other. Together with the insistence on the processual and customary nature of the founding of the public order, this idea of substantial constitutional law makes Hauriou one of the most notable scholars advocating the concept of material constitutionalism.[84] Nowadays such approach to constitutional law becomes more and more popular, for instance in the context of analysis of the EU legal order and the debate about its gradual constitutionalisation.[85] Referring to Hauriou's idea of supra-constitutionality discussed above, the concept of social constitution also sets an interesting conceptualisation of legality as continuity detached from political institutions as such (*continuité de droit d'Etat*), by which Hauriou advocated for the continuous application of the Declaration of the Rights of Man and of the Citizen from 1789 regardless of the lack of its incorporation into the positive law of the Third French Republic, as well as for a limited scope of the power of constitutional amendment, even in the case of a complete change of constitutional regimes.[86]

4. Reception of Hauriou's theory and its current relevance

The theory of the institution described above, although today barely known beyond the French legal science, has played a noteworthy role in the history of legal thought in the twentieth century. Hauriou's work was, for instance, the main inspiration for the legal pluralism of Santi Romano (1875–1947), the author of *L'ordinamento giuridico*, and, what is particularly important, for Neil MacCormick and Ota Weinberger, the authors of the neo-institutional theory of law which lies at the roots of the doctrines of constitutional pluralism, largely debated today in the science of EU law.[87] What also deserves a mention is the influence of Hauriou's institutionalism on the thought of Carl Schmitt and his concept of the concrete order-thinking (*Konkretes Ordnungsdenken*) that has become almost mythical, but, as it is often claimed, largely over-estimated.[88] Despite similar, material approach to constitutionalism, the observations of these two authors differ significantly, especially as regards the status of liberal principles amongst the basic principles of politics and the view on the instances of sovereignty.

Despite some reception and continuation of Hauriou's thought in later works on legal theory, it is not possible to identify institutionalism as a broader movement, of

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[82] N. Foulquier, *Maurice Hauriou, constitutionnaliste (1856–1929)* [Eng. *Maurice Hauriou, Constitutionalist (1856–1929)*], "Jus Politicum" 2009/2, http://juspoliticum.com/article/Maurice-Hauriou-constitutionnaliste-1856–1929–75.html, accessed on: 22 June 2022.

[83] M. Hauriou, *Précis de droit constitutionnel*..., p. 638.

[84] J.-A. Mazères, *Réflexions*...

[85] D. Halberstam, *Internal Legitimacy and Europe's Piecemeal Constitution: Reflections on Van Gend at 50*, in: Court of Justice of the European Union, *50th Anniversary of the Judgment in Van Gend en Loos. Conference Proceedings*, Luxembourg 2013, p. 114 ; O. Beaud, *Puissance de l'Etat*..., p. 457ff.

[86] See: M. Hauriou, *Précis de droit constitutionnel*..., pp. 258–259.

[87] *Nota bene* in their book, the authors wrote a separate chapter on Hauriou's theory; see: N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Dordrecht 1986, p. 24ff.

[88] Th. von Büren, *Carl Schmitt, lecteur de Hauriou* [Eng. *Carl Schmitt, Hauriou's Reader*], in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., p. 195.

which Hauriou would be the founder. As claimed by Aristide Tanzi, the institutional turn in legal theory cannot be easily qualified as a theoretical movement due to lack of a common definition of the institution and a variety of approaches. Even if some common ontological and epistemological assumptions exist within all theories called institutionalist, this movement remained strongly heterogenic and can be quite close to or even mistaken with theories such as legal positivism, legal realism, natural law concepts or sociology of law.[89] Its classification was attempted by Giuseppe Lorini who proposed to make a distinction between three groups of institutional theories, i.e. Hauriou's and Romano's institutionalism, institutism (more focused on institution as mental representations), and neo-institutionalism developed by MacCormick and Weinberger, focusing on the analysis of so-called *institutional facts*, considered a point of reference for traditional normative analysis of law.[90]

The continuity of those three types of institutionalism suggests that Hauriou's theory can, nevertheless, still be of an accuracy and relevance in the contemporary legal science. The institutionalism has *inter alia* many common points with Ronald Dworkin's theory of the Hercules, the Rousseau's concept of continuous democracy or Pierre Rosanvallon's reflexive democracy.[91] It seems, moreover, that Hauriou's theory can be considered also an actual prefiguration of the contemporary concept of societal constitutionalism of Dario Sciulli, Gunther Teubner and Chris Thornhill, which shares, *inter alia*, the institutional assumptions of the composed character of social, constitutional order, primacy of material over formal constitutions, focus on legal pluralism and self-constitutionalising as well as diachronic perspective on the functioning of institutions as living social beings, however, with a strong focus on the necessity for deliberation and common procedures in the process of negotiation of the meaning of socially important notions.[92] In this context, Hauriou's theory can find its current use in the more and more popular tendency in the science of constitutional law to combine sociological and theoretical approaches resulting from crisis of universalistic concept of constitutionalism, the growing importance of the constitutions' identity function accompanied, on the other side, by increasing constitutional pluralism and globalisation of legal orders.[93]

5. Closing remarks

Hauriou's institutional theory of state and law is rather complex in its assumptions and may thus cause some interpretative difficulties. As previously mentioned, starting from his first sociological texts such as *La science sociale traditonnelle* (1896), through his first outline of general public law theory in *Principes de droit public* (1910) to the paper from 1925, his works completed his theory with further observations or new inspirations and,

[89] A. Tanzi, *Cosa resta dell'istituzionalismo giuridico* [Eng. *What is Left from Legal Institutionalism*], Padova 2004, https://lircocervo.it/?p=249&page=4, p. 2, accessed on: 22 June 2022.

[90] The institutionalism, according to Tanzi, includes also Hauriou's disciples such as Georges Renard (1876–1943), Joseph Delos (1891–1974), Georges Gurvitch (1894–1965) and Romano's continuers: Cesarini Sforza (1886–1965) and Constatino Mortati (1891–1985); A. Tanzi, *Cosa resta dell'istituzionalismo*…, p. 2.

[91] A. Barut, *Prawo jako wyraz „idei kierującej". Koncepcja Maurice'a Hauriou i jej aktualność* [Eng. *Law as an Expression of the "Guiding Idea". Maurice Hauriou's Concept and its Relevance*], "Prawo i Więź" 2020/44, p. 371.

[92] Cf. K. Muszyński, P. Skuczyński, *Rozwój i kryzys konstytucji społecznej. Przypadek samorządów zawodowych* [Eng. *The Development and Crisis of the Social Constitution. The Case of Professional Self-Governments*], Warszawa 2020, p. 4ff.

[93] P. Blokker, Ch. Thornhill, *Sociological Constitutionalism. An Introduction*, in: P. Blokker, Ch. Thornhill (eds.), *Sociological Constitutionalism*, Cambridge 2017, pp. 7–20; cit. after: K. Muszyński, P. Skuczyński, *Rozwój*…, p. 20.

thus, constantly improved it. In the words of Jean-Arnaud Mazères, the theory of the institution is therefore "a fruit of a long ripening"[94] and, as such, is full of contexts and references, accumulated over almost forty years, between which the theory of institutions "oscillates".[95] As claimed by Mazères, Hauriou's thought is also, by its very nature, difficult to reconcile with the traditional, doctrinal legal science as, according to him, "the doctrine of law is mistrustful towards the philosophy that only blurs legal way of thinking, complicates it and weakens its power".[96] Major qualms may be raised as to the extent to which Hauriou's institutionalism can provide for definite answers to resolve legal problems, as it goes in the opposite direction than that of the majoritarian legal doctrine associated with strict positivism, technicity and specialisation of law.[97]

Notwithstanding the above, the ongoing development of law which undermines self-sufficient and autonomous character of national legal orders more and more often calls into question the firm status of strict positivism as the operative legal methodology. With regard to this, Hauriou's theory was an explicit attempt to capture legal phenomena in their complex relations which we witness nowadays. And even if it were to be true that the mere conclusion on complexity does not resolve any dilemma on legal philosophy,[98] as Julia Schmitz rightly points out, the uniqueness of Hauriou's thought lies in this very endeavour to tackle the multifacetedness of law[99] as such institutional theories still present an interesting perspective on the dichotomy between normativity and facticity of law.[100] In this vein, Hauriou's works, much forgotten in today's legal discourse beyond France, could, in my opinion, be read anew today, especially in connection with the debates on reflexivity in law, as well as on theoretical misconceptions of today's doctrines of constitutional pluralism and as a support to the idea of societal and multi-level constitutionalism with a view of an organised interdependence of legal orders.

Maurice Hauriou's Theory of the Institution: Legal Institutionalism and the Science of the State

Abstract: The aim of this paper aims is to reconstruct the original context, the characteristics and the main assumptions of Maurice Hauriou's theory of the institution as one of the most coherent and comprehensive examples of legal institutionalism. By means of critical source analysis, the paper presents the basic elements of the notion of the institution together with its ontological and epistemological assumptions concerning both the very concept of law and legal methodology. The second part of the paper presents the critical approach expressed in Hauriou's theory towards some core concepts of public and constitutional law by opposition

[94] J.-A. Mazères, *La théorie de l'institution de Maurice Hauriou ou l'oscillation entre l'instituant et l'institué* [Eng. *Maurice Hauriou's Theory of the Institution or Oscillation between the Instituing and the Instituted*], in: J. Mourgeon (ed.), *Pouvoir et liberté: études offertes à Jacques Mourgeon* [Eng. *Power and Freedom. Texts offered to Jacques Mourgeon*], Brussels 1998, p. 239.

[95] J. Schmitz, *La théorie de l'institution*…, p. 59.

[96] J.-A. Mazères, *Le vitalisme social de Maurice Hauriou (ou le sous-titre oublié)* [Eng. *Maurice Hauriou's Social Vitalism (or the Forgotten Subheading)*], in : Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., p. 230.

[97] J.-A. Mazères, *Réflexions*...

[98] T. Gizbert-Studnicki, *Ujęcie instytucjonalne w teorii prawa* [Eng. *Institutional Perspective in Legal Theory*], in: J. Stelmach (ed.), *Studia z filozofii prawa* [Eng. *Studies on Legal Philosophy*], Vol. 1, Kraków 2001, p. 123ff.

[99] J. Schmitz, *La doctrine juridique face à la complexité*, in: Ch. Alonso, A. Duranthon, J. Schmitz (eds.), *La pensée du doyen Hauriou*..., p. 239.

[100] T. Gizbert-Studnicki, *Ujęcie instytucjonalne*…, p. 134.

to traditional, normativist and positivist approaches to constitutionalism. Despite its importance as indirect inspiration for contemporary doctrines of constitutional pluralism, Hauriou's work is nowadays barely present in European legal science discourse. The last part of the paper is therefore dedicated to some closing remarks on current relevance of the theory of the institution with particular focus on the challenges of increasing pluralism of legal orders.

Keywords: legal institutionalism, theory of the institution, Maurice Hauriou, constitutional pluralism, supra-constitutionality, legal theory, sociology of law

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