

Christopher Berry Gray

The Methodology of Maurice Hauriou: Legal, Sociological, Philosophical.

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Some booksellers are now asking an astronomical 700 euros for original editions of French legal theorist Maurice Hauriou (1856-1929). So it's good news that many of the major works of the famous dean of the Toulouse law school are now available online free in the Gallica collection of the French National Library (BNF) (<http://gallica.bnf.fr/?lang=EN>) and at the Internet Archive (<http://www.archive.org/>).

But while the access may be free, Hauriou's work is often far from accessible—and not just because he wrote only in French. With a rare mastery of legal history, sociology, philosophy and even psychology, physics and theology, Hauriou demands much from his readers. What's needed is a key to help unlock the riches of his thought, and this is undoubtedly Christopher Gray's major contribution in this unrivalled study. Taking the whole canon of Hauriou's lifetime of work, Gray distils from it an ordered and original synthesis of the underlying legal, sociological and philosophical methodological approach. Whereas many earlier Hauriou commentators have been preoccupied with his iconic 'theory of the institution', Gray shows that Hauriou's methods have an even wider and deeper relevance.

Although Gray specifically disclaims offering a definitive account of his thought, it is hard to imagine a better accompaniment to the reading of Maurice Hauriou. But perhaps befitting its subject matter, Gray's book is no easy weekend reading. Those seeking an introduction in English to Hauriou's work may be better off looking for Joseph Albert Broderick's 1971 book, *The French Institutionalists*, which offers a selection of key translated texts from Hauriou and his disciples. On the other hand, what Gray does is to unpick how Hauriou operated; indeed, he shows us how to study law à la Maurice Hauriou. Gray complements his mastery of Hauriou's own thought with a comprehensive and detailed overview of his legal heritage together with a superb 20-page almost 'complete' Hauriou bibliography as well as a substantial list of works cited. Here, the relatively few English language references illustrate the significance of Gray's work for the English-speaking world.

Gray also demolishes a number of commonly repeated misconceptions concerning Hauriou's work, e.g., his alleged 'Thomism' (27). Certainly, as a Catholic, Hauriou was not immune to the revival in Thomist studies of the late 19th and early 20th centuries. But as Gray notes, it was Hauriou's disciples Georges Renard and Joseph Delos, both Dominicans like Aquinas himself, who added the Thomist gloss to Hauriou's theory of the institution. The truth, as Gray shows, is that Hauriou, true to his generation, was much more eclectic—even dialectic—in his philosophical leanings.

Although Gray non-committally cites a famous Marcel Waline quote to the effect that Hauriou was ‘as important in the history of ideas as Marx’, today—twenty years after the fall of the Soviet Union—there may now be sufficient reason to believe that Hauriou’s impact has indeed finally eclipsed that of Marx. As Gray notes, Hauriou appears to be experiencing a revival of influence, particularly in the democratizing nations of Central and South America.

This is no surprise, considering that Hauriou also wrote his major works around the turn of the 20th century when France was still developing its own democratic institutions. In this context, it is also significant that Hauriou belonged to the Sillon (Furrow) social movement founded by Marc Sangnier (J. Fournier, ‘Maurice Hauriou, arrêriste’, in *Études et documents*, Conseil d’Etat 1957, 161), which aimed to promote a conception of democracy understood as the ‘social system that tends to maximize the civic consciousness and responsibility’ of each person. In other words, for Hauriou, democracy is not a system ready made for adoption but rather it unfolds over time as a work in progress and not as a revolutionary change of guard. Indeed, in Hauriou’s institutional theory, democratic institutions evolve as the ‘idée de l’oeuvre’ (idea of the project) gains ground and takes on enduring juridical form. This is precisely how Robert Schuman and Jean Monnet, ‘fathers of the European Union’, envisioned the emergence of that institution. ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity,’ noted the Schuman Declaration of 1950 (Robert Schuman, *Declaration of 9 May 1950* [http://europa.eu/abc/symbols/9-may/decl_en.htm]) in a clear echo of Hauriou.

Through the generation of lawyers formed by his thought, Hauriou also wielded considerable influence on the institutional form of France’s Fifth Republic, as well as on the doctrines of the International Court of Justice. Later again, Hauriou’s work also became influential in Turkey, precisely as that nation turned to democracy (Bogaç Erozan, ‘An Interpretive Approach to the History of Political Science: Turkey in Comparative Perspective’, in *EPS*, Spring 2004, no. 3.2).

Despite all this, Hauriou’s work has had little impact in the common law jurisdictions, even though he was both an admirer of the English legal system as well as occasionally a severe critic. In particular, he was scornful of the common law’s inability to deal with legal personality as anything more than a legal fiction. This he dismissed as the outcome of a nominalistic approach to law that resulted in treating names as ‘no more than useful vocables’ or as an ‘empty sound’ corresponding to ‘no factual reality’ (161).

Even today Wikipedia notes that ‘the concept of a legal person is a fundamental legal fiction’ (http://en.wikipedia.org/wiki/Legal_personality), testifying to the pervasiveness of a concept that developed historically simply as a way to sidestep the fact that English law refused to recognize any but natural persons. And yet is there not something monumentally inadequate in holding, for example, that the legal personality of the USA, with its 300 million citizens, 10 million km² of territory and 10,000 nuclear weapons, can only be represented in legal terms by a ‘fiction’? Moreover, in a globalized world where transnational corporations operate in multiple jurisdictions, often

controversially transferring income between subsidiaries, surely the real fiction is to allow an objectively global institution to artificially divide itself into multiple legal entities for the purpose of minimizing tax, for example, as does Google (and many others) through subsidiaries domiciled under flags of convenience.

By contrast, Hauriou's approach, founded on the 'method of observation' (32) often associated with pioneer sociologist Frederic Le Play, calls for a complete paradigm change, viz., start by understanding the reality that lies behind legal representations. To quote Hauriou in 1905, 'all social institutions are painted over with law, but underneath this covering of paint they have a reality which is purely social' (131). Lawyers must therefore remember that under the legal coating lies 'a social flesh, living, suffering, and demanding' or even, as we might add, exploitative. Thus, contends Hauriou, 'the study of institutions is to law as the study of sociability is to social science.' Moreover, he continues, legal theory must be based 'on ever more analytic observation of the facts' (84). However, rejecting a then current preoccupation with science as a deductive almost deterministic discipline, Hauriou also emphasizes the orientation of law to life (87). In turn, the task of law is 'to institute society' by infusing it with 'an internal principle of life'.

Late in his life, he would find that this approach could best be described as phenomenological, in the sense in which 'philosophy needed to let the social sciences found themselves on the method of observation, for it founds the objectivity of ideas right in the interior of human consciousness' (32). However, as Gray notes, 'many fail to grasp the demands of this method of observation, observational, rigorous, and transparent. Most want finished systems, but Hauriou's work is plagued by incompleteness because of its observational character. He builds ensembles, and then continually rebuilds them, so that his works are only "successive bulletins of a research laboratory"' (84).

But this is also a key, if not the key to Hauriou, Gray continues, noting that 'this ideal of the "legal laboratory" was behind Hauriou's entire conception of what a law school should be'. Law is an observational, experimental and constructive discipline, Gray concludes, and therefore 'the best criterion of Hauriou's methodology is whether it can be used for doing law, social science and philosophy.' He finds that Hauriou's methodologies 'make more reliable his theory of institutions as an instrument for analysis of legal and social realities.' Hence, 'they also make it plausible to accept institution as truly an existent in the field of these realities' as a welcome addition and corrective to our collective knowledge (192).

More than 80 years after his death, the historical evidence outlined above confirms Gray's conclusions, with Hauriou's work contributing to the building of democratic institutions stretching from the Americas to Europe and to the borders of Asia. As the Arab world undergoes its own spring, there is reason to think that Hauriou's work is of growing relevance, making Gray's book even more timely.

Stefan Gigacz