

An Introduction to Maurice Hauriou's Theory of the State

Yasuo HASEBE

This paper analyses Maurice Hauriou's theory of the state, drawing in particular on his *Précis de droit constitutionnel*, 2nd ed. (Sirey, 1929), the last of his main works.

According to Hauriou, the state is the 'institution of institutions', the governing system of all institutions within the society. Since the foundation of any institution is customary assent — *consentement coutumier* — by its members as well as its outer environment given to the governance of the institution, the foundation of the state is also customary assent given to it. The customary assent he refers to is more like acquiescence rather than actual consent. People should decide whether to accept the whole state system and its actions or to revolt against it. Under usual circumstances, people just accede to this standard contract — *contrat d'adhésion*.

Since the state is a kind of institution, it is led by its ideas of enterprise, equipped with governing organs, maintains its stable equilibrium, and becomes the object of customary assent by its members, as every institution is and does. Seemingly, in his theory, the superiority of the state over other institutions is explained and justified by the state's co-ordinating functions of social intercourses of its members. However, behind the surface, the authority of the state is legitimated by the fact that its powers are derived from God: *omnis potestas a deo*. While in time of peace the legal institution

covers this theological basis, in the state of exception, the godly *de facto* power appears from behind the legal façade.

After all, contrary to his assertion that his theory purports to justify state authority with recourse to objective, sociological analyses of functions performed by the state in the society, ultimately his theory of the state is based upon his subjective election of Catholic religious belief. It would be difficult to conciliate his theory on law and state with modern constitutionalism, which purports to realise fair co-existence of plural worldviews within a society.