The European Journal of International Law Vol. 23 no. 1 © EJIL 2012; all rights reserved

Politis and Sociological Jurisprudence of Inter-War International Law

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Abstract

This article attempts to shed some light on the French Sociological Law School, its doctrinal presuppositions, social surroundings, and different personal expressions, focusing then on the contribution to that doctrine of one of its major exponents, Nicholas Politis.

1 Reasons for the Emergence of Sociological Jurisprudence in International Law

On the international plane as on the municipal, sociological jurisprudence established itself at the beginnings of the 20th century, in the wake of a reaction against predominant positivistic thought. In international law, positivism had been essentially will- and consent-oriented. Law could exist only as a formal datum of experience. It could never be a product of (subjective) speculation about what ought to be or about justice. It had to be a particular fact of life, a legal fact, established through the formal channel of legislation. All that the formally established legislator enacted as law by following the procedures organized to that effect had to be considered the law, the only law, and all the law. There was no law outside these enactments. In the international society, however, there was no single and centralized legislator. The function of law-giving remained decentralized, as also the function of execution of the law. Hence, legislating here meant concluding agreements between and among states. Such agreements were the formal social facts giving rise to law in a society of equal sovereign entities; and they were also cognizable by immediate experience. Agreements or treaties thus became at once the only true source of international law (customary law being configured as a tacit agreement) and the theoretical foundation of the international legal order, i.e., the ultimate explanation of its binding character.

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 doi: 10.1093/ejil/chs012

This type of construction had well suited the times of the Westphalian Society, after the Grotian effort to devise a new international legal order for a new international society of equal sovereigns. It first of all reflected the basic premise of the system, namely equal sovereignty and independence. Between independent persons there can be no imposition of law; otherwise these persons would not be independent, but rather subjected to the sway of some higher subject. Conversely, these persons may agree among themselves as to what the law should be. The agreement is the vehicle *par excellence* of some law-creation in a decentralized society. Moreover, the newly born states, once liberated from subjection to the Pope and Emperor, indulged themselves in a phase of power-politics, of expansion, and of war. A minimal international law, mostly restricted to the agreements between these states, perfectly fitted the demands of the day. Secondly, the positivistic thought allowed one to move beyond the mainly doctrinal construction of international law. Grotius and the other 'fathers' of modern international law attempted to draw up a new international legal order for independent and equal states by moving away from the tradition of supranationalism of the Middle Ages. To that end, they drew on the two sources of law they had at their disposal: the Roman law (*nemo jurista, nisi romanista*) and the natural law. Especially the natural law movement of their days gave them the freedom to devise rational principles for the new setting of sovereign states. It is of no surprise that these lawyers inspired themselves heavily by these natural law streams, which gave them so much freedom in shaping a new law of nations according to the dictate of 'right reason'. Hence, the first chairs of teaching of international law were at once chairs of natural and international law. As a result, classical international law was at its inception mainly doctrinal, not practical. Positivism allowed one progressively to move from 'theoretical speculations' towards the effective practice of states, and hence to mantle international law with the chrism of positivity. By the same token, historical and cultural facts were again instilled into the law at the place of abstract rational craftsmanship. Thirdly, the positivistic explanation could fit an international society such as that of the 19th century, where it had its heyday. This society was at once relatively calm and slowly moving. In it, conservatism prevailed. Positivism is a perfect expression of conservatism. What consent has done, only consent can dismantle. Since it is difficult to get the consent of all, the legal régimes tend to remain stable and to be sheltered against change. Slow motion prevails. Moreover, the 19th century was based on an international law at once of coexistence and of predatory conduct. Coexistence prevailed in peacetime. There was hardly any definition and promotion of common concerns of the international community. The law limited itself essentially to diplomacy, transactions (treaties), and war. Predatory conduct dominated in the fields of *jura ad bellum* and *post bellum*, since the use of force, the annexation of territory, colonialism, or unequal treaties were not prohibited. Coexistence and 'predation' need no more than power and agreements. Positivism perfectly fits the needs of such a society.

Things changed at the beginning of the 20th century. The World War had brought untold destruction and threats of future heavy turmoil. Moreover, interdependence had grown. Common concerns of the international community, spawning beyond the

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will and interest of states taken *uti singuli* or in small groups, had vigorously emerged. The great theme of the time was that the international society had to be 'organized' in order to extract it from the anarchy and rule of power into which it had hitherto plunged. To that end, great international organizations were devised and realized: the League of Nations, later the United Nations. Common concerns continued to grow during the whole of the 20th century: peaceful settlement of disputes for prevention of war, non-use of force, collective security, arms reduction and control, human rights, humanitarian law, protection of the environment, etc. It is quite obvious that the attempt to 'organize' international society – as in the past municipal society had been organized and steered towards the rule of law – supposed going beyond the all-powerful will of single states. A somewhat community-oriented international law must look beyond arbitrary agreements of states as the basis and the main expression of the legal order. *Sic volo sic jubeo*. . . cannot be the cardinal rule in the wake of such an effort of reconstruction. Firmer ground must be looked for. The essence became to bind states to some of such common concerns and the norms they give rise to. The crucial aspect was how to bind states *without their consent* in view of the pressing new needs of the international community. In that perspective, the ground of positivism had at least partially to be left behind. New doctrinal orientations became necessary on the grounds and basis of international obligation. The subjective explanation of the source of obligation (*Rechtsgeschäft*) had to yield to some form of objective construction (*Recht*). Sociological thought in international law has been one attempt to respond to this challenge of reconstruction of the legal order on the firmer ground of objectively valid norms, notwithstanding the individual will of this or that sovereign state, or indeed of this or that different drummer.

2 Sociological Thought in International Law[1]

If international legal sociology attempted to break new ground by bypassing old-fashioned will-oriented positivist schools of thought, one of its distinctive features is that on another aspect (unlike the revived natural law doctrines) they did not want to break with the positivistic tradition. Positivism is based on the rejection of metaphysics or speculation. Law is not about what 'could' or what 'ought to' be; law is not morals or justice; it is a distinct piece of reality which is open to experimental knowledge. This leg of positivism the new sociological school wanted to maintain and did maintain. It hence delimited itself clearly and sharply from natural law theories. In the sense indicated, sociological theories therefore brought to its last consequence the causal method of positivistic approaches. Law is about 'is', about 'what is'. It must be known by experiment and by 'scientific' research, not by speculation. However, unlike in positivism, the true and ultimate source of legal obligation is not in the artificial wills of states. This will and consent is just the superficies of the law. Beneath it are the reasons directing and capturing the wills. In that perspective, law is prior to

[1] See A. Truyol y Serra and R. Kolb, *Doctrines sur le fondement du droit des gens* (2007).

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the state and to its arbitrary wills. It is a social product, forming itself through spontaneous social interaction. The legislator can only seize it, capture it, photograph it; he does not create it. Effectiveness of social behaviour is the ultimate source of law. *Ubi societas, ibi jus*. Hence, by the same token, sociological thought is predicated on a 'realistic' theory of law.

The state itself is often viewed with suspicion by these new sociological doctrines: it is too powerful; it imposes arbitrary wills; it tends to escape from the bounds of the rule of law. The true subjects (persons) of the law, the ones who really and not only metaphysically or metaphorically interact, are the individuals. Many international sociological theories hence concentrated on the individual as the true actor of the law and tended to discard the state. The state is just one society among innumerable others. The individual, on the contrary, is a true legal person, the ultimate point beneath which it is impossible to break down legal personality and social action. The sociological theories of the Inter-War period were thus essentially individualistic and opened up to an effort of establishing the pre-eminence of the (rule of) law, domestically and internationally.

The environment for such a sociological thought was particularly favourable in France.[2] Here there was a strong school of municipal sociological thought, reacting against the old '*Ecole de l'Exégèse*' and the absolute Jacobinian state-model. Secondly, in France the positivistic tradition (since A. Compte) had triumphed. Sociologism was a means of fighting against state-centred and will-oriented positivism without giving up the anti-speculative and anti-metaphysical tradition. Thirdly, the French lawyers of the turn of the century were progress-oriented. Progress of civilization and science was a *Leitbild*. Sociological thought seemed to be the only way to achieve such progress in legal thought. Positivism had had its day. Natural law was still regarded as more old-fashioned and linked with the conservative Catholic Church. Only sociological thought truly broke new ground. Only it was 'progressive'.

Legal sociological thought can be construed more objectively or more subjectively. In a 'subjective' version, the ultimate test of the law is the legal conscience or conviction in the social forces. The law is what is socially 'recognized' as law. *Opinio juris* here plays the central role. This version of sociologism had been defended mainly in Germany (E. Bierling, M. Weber, E. Ehrlich). In an 'objective' version, the law is a conglomerate of social facts. For the French school, this conglomerate of facts was essentially based on social solidarity, i.e., the law is a product of material interdependencies of the social actors (economic, political, cultural, division of work, etc.). The law tends to flow directly and objectively from these social interactions. The legislator just draws the detailed consequences of it in his enactments. The two directions never remained completely separated. On the contrary, they often tended to merge into one another, with the only difference of accent. The French school of L. Duguit, G. Scelle, and N. Politis is pre-eminently rooted on the objective side of these theories. However,

[2] See M. Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870–1960* (2001), at 266ff.

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these authors also give some place to the legal conscience. In that sense, their theories are mixed.

3 Léon Duguit as the Spiritual Father of Politis' Doctrine

Nicolas Politis was inspired by one of his progressive teachers, Léon Duguit, a constitutional lawyer of great influence at the beginning of the 20th century. For Duguit[3] the basis of the law is the fact of 'solidarity' or of 'interdependence' between human beings. One may notice in passing how well that fundamental basis of the doctrine suited the needs of modern international law: common concerns and the construction of an objective international law – and 'solidarity'! For Duguit, the rules of the law spontaneously emerge from social contact based on solidarity, since without them social life and interaction itself would not be possible. These social rules, of a moral or economic character, become legal rules when they are internalized by the different individuals interacting as being necessary to their dealings. A slight subjective element here enters into Duguit's construction. This solidarity does not stop at the boundary of the state. It extends beyond. Hence an international law emerges. It becomes binding when the different social actors have developed the conscience (arising out of a social necessity) of the need to respect its rules. The *opinio* is here *juris sive necessitatis*. Municipal and international law thus possess the same legal basis. Both belong to the same legal system, which is monistic. The basis of all law is solidarity and social interaction. The circles of the solidarity differ, going from the most local (family) to the most ecumenical (world society), without any discontinuance. Law is thus ultimately based on a social fact being anterior and superior to human will. It is not created arbitrarily but flows from social solidarity.

This all too short summary of Duguit's thinking shows all the many ideas international lawyers such as G. Scelle and N. Politis took over from this construction. The distinctive contribution of G. Scelle and N. Politis was to adapt that thinking to international society. Duguit had thought mainly on the lines of municipal society. His consideration of international society is an addition and short. For Scelle and Politis, it obviously becomes central. G. Scelle developed the thinking of Duguit by giving it its most perfect theoretical expression for international society. N. Politis remained more strongly engaged in international practice, without however becoming a true 'practitioner'. He never gave a theoretically as developed expression of his doctrine as G. Scelle had done for his own. It is therefore necessary to collect passages in different of his writings in order to illustrate his way of thinking.

4 The Sociological Doctrine of N. Politis

It is mainly in two learned pieces of writing that N. Politis developed his sociological conception of international law. They are both situated in the middle of the 1920s,

[3] *Droit constitutionnel* (1907), at 1ff, especially 9ff.

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at the peak of his intellectual force and career. First, in his masterly Hague course on '*Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*' (1925);[4] secondly, in his monograph on '*Les nouvelles tendances du droit international*' (1927). For reasons of space, we will quote some passages only of the first of these two writings.

In the Hague course, the following passages are particularly illuminating. They must be quoted in the original French, in order to keep their peculiar flavour and modality of expression. This is particularly true for an author like N. Politis, whose exceedingly elegant way of expression has for years prompted the greatest admiration of the present author:

> *Le fait dominant de notre époque est la solidarité des relations humaines aussi bien au delà qu'en deçà des frontières; elle gagne de proche en proche tous les milieux avec une force et une ampleur croissantes. Prenant son point d'appui sur ce grand phénomène social, une doctrine juridique s'est formée qui a complètement renouvelé les notions du droit public interne et, par voie de conséquence, celles du droit international. Elle professe que l'Etat est une pure abstraction. Comme tout groupement, il n'est pas une fin en soi, mais un moyen, un simple procédé de relations entre les êtres humains qui le composent. L'ancienne conception métaphysique d'une puissance qui commande, c'est le néant. La réalité montre simplement que, parmi les membres d'un groupement, il en est qui sont investis des pouvoirs nécessaires pour gérer les intérêts collectifs dans le but de permettre à tous d'entretenir, soit entre eux, soit avec les membres d'autres collectivités semblables, des rapports aisés et de plus en plus multipliés. On a pu, dès lors, dire que l'Etat moderne tend à n'être plus une puissance qui commande pour devenir une fédération de services publics qui administre. Derrière la vaine fiction de l'Etat, il n'y a qu'une seule personne réelle : celle de l'individu. Il en est ainsi de tout groupement humain. Si l'Etat est une pure abstraction, la communauté internationale, telle qu'elle a été comprise jusqu'ici, comme la réunion des Etats, est une abstraction plus grande encore: c'est une immense somme de fictions. En réalité, elle a au fond la même structure humaine que les communautés politiques internes. Elle est tout simplement composée d'individus groupés en sociétés nationales. Il en résulte que le droit international ne saurait être autre chose que l'ensemble des règles régissant les rapports des hommes appartenant à divers groupements politiques.*[5]

This seminal passage contains many insights. First, the rejection of speculation and metaphysics. The law is not about fictions, abstractions, or constructions. It is about 'reality' (this word occurs regularly in the text quoted, and it is always opposed to abstractions). The state itself is an abstraction. The international community as a society of states is a still greater fiction. Reality is simpler: the word '*simplement*' also occurs twice at very symptomatic places. Law is solidarity of individuals interacting between themselves. Politis and the other sociologists have here a common trait with the transcendental school of H. Kelsen: the fight against metaphysical notions such

[4] 6 *RCADI* (1925-I) 1, at 5. A Secretary General of the Curatorium of the Hague Academy has written regarding it: '[i]t was a classic as to delivery in the fullest sense of that term. Presented without a single written note, and without a single lapsus of speech, they were [the lectures] of a lucidity, a transparent clarity, a force of persuasion and a perfection of form which I do not recall having heard equalled – a veritable 'tour de force'. . . . A shimmering Ionian temple vividly called to mind, and very respectfully remembered': see E.N. Van Kleffens, 'Recollections and Reflections', in Hague Academy, *Livre du Cinquantenaire* (1973), at 74.

[5] *Supra* note 4, at 6–7.

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as 'State', 'legal person', 'subjective rights', etc. The law is centred on the needs and life of individuals. It is freed from the oppressive mantle of a state as the eternal commander. The law is prior to and above the state. Secondly, the unity of the social phenomenon: international law has the same roots and subjects (persons) as municipal law, namely individuals; the legal phenomenon is necessarily monistic. Thirdly, there is the constant and subtly constructed opposition between the past and the present. In the past, legal doctrine was. . .; today, it is reconstructed along the following lines.... The impression thus created is that of a radical departure, of a revolution rather than an evolution. Behind this conception lurks the 19th century and beginning of the 20th century conception of constant progress of humans and civilization. The traditional image of the 'civilized states' was taken over in a larger framework to become that of a civilized international society and of a civilized international law. Fourthly, international law is no longer just the law between states, a political law, a *jus inter postestates*. It becomes a 'private international law' writ large, encompassing all relations of individuals transcending a national boundary. In this sense, the sociological doctrines are the forerunners of the more recent 'transnational law' currents. Summing up, Politis visibly adopts all main tenets of the sociological school of his day. He then goes on to say:

> *L'idée puise une force particulière dans les nouvelles doctrines sur le fondement du droit international. On n'y voit plus la manifestation d'un ordre ou le produit d'une volonté, mais le résultat de la solidarité créée par les besoins sociaux: les rapports entre individus de pays différents, comme ceux entre individus du même pays, créent des usages économiques et moraux qui deviennent des règles de droit obligatoires lorsque entre ces individus naît une conscience juridique, c'est-à-dire le sentiment qu'ils doivent agir les uns vis-à-vis des autres en conformité à ces règles dont la violation produit dans la masse des esprits une réaction tendant à réaliser leur sanction effective.* [6]

This passage is heavily drawn from Duguit. It shows how (enlightened) public opinion becomes the essential tool for the effectiveness and enforcement of the modern international law. The individual is the main actor of international law. This law flows from its dealings and juridical consciousness. Hence, it is also sanctioned through the individual and its juridical conscience. A law not lived by and in that sense not sanctioned has ceased to be effective and thus has ceased to be law altogether. In turn, this just means that the solidarity which lies at its heart has ceased to exist or to be felt. In that sense too, law is and remains a piece of living reality and of constant movement. It is not a form, an enactment, legislation. It is a piece of (social) life.

The consequence of the preceding passages is that the state is neither a reality, nor can it – *a fortiori* – be sovereign. Politis hence passes on to a frontal attack against sovereignty. He sees in it the major obstacle to the development of a less anarchical international legal order. Moreover, he identifies sovereignty with the state as a 'commander', with its arbitrary power policy wills: '*[c]e principe, sur lequel, durant quatre siècles, a été orientée toute la vie internationale, est comme ces astres depuis longtemps éteints qui frappent néanmoins encore nos regards. Atteint par les nécessités sans cesse changeantes de la vie, réduit en lambeaux, ruiné au point de ne plus mériter de place que dans le domaine*

[6] *Ibid.*, at 9.

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des souvenirs, il continue à éblouir la vue et d'arrêter la pensée. . . C'est un écran qui voile la réalité. Il faut donc s'en débarrasser si l'on veut voir clair.'[7] One feels in this passage an accession of righteous commitment, all the more vivid as the author probably feels that sovereignty is still much more entrenched in facts of international law than he is pretending himself. He goes on: '*[l]a souveraineté est la puissance suprême, le pouvoir le plus entier, le plus complet que l'on puisse imaginer. Appliquée à une volonté humaine, cette notion signifie le droit pour elle de ne se déterminer jamais que par elle-même. . . [I]l est difficile d'expliquer comment cette volonté reste souveraine tout en étant limitée par des règles de droit obligatoires. Un dilemme se pose auquel on ne peut échapper: ou l'Etat est souverain et alors il ne saurait être soumis à des règles impératives; ou il y est soumis et alors il n'est pas souverain. . . .[U]ne souveraineté réduite n'en est plus une, car, par définition, elle implique une notion absorbante et exclusive de toute restriction.'*[8] This passage is well made in order to frighten and intimidate. Sovereignty is depicted as somewhat dangerous and evil. If international society still plunges into anarchy, it is because each state pretends to be its own and wholly independent law-giver. It is impossible to construct anything solid on such a moving ground of eternally shifting individual wills. But Politis wants to construct something solid. He thus feels compelled to reject sovereignty, construed somewhat dogmatically as being 'by necessity' an absolute power and never a relative one, subjected to the rules of law. This is a most acclaimed technique: depict your adversary in its worst (and even exaggerated) features in order to be then better able to shoot him down.

For reasons of space, the sequence of quotations and explanations must be broken up here. There remains to be added that N. Politis, who died in 1942 in Cannes, had time to witness with supreme disappointment the crumbling of international solidarity and the new and progressive international law he had fought for for all his life. In his last book, betrayed by his convictions on international solidarity and not ready to make peace with his eternal foe, the positivistic sovereign will of triumphing power-states, he slightly reverted back to the other limb of objectivistic law theories, namely natural law. Without truly adopting such a school of thought, he inclined towards it in some passages, the most famous of which is the following: '*[q]uand dans une collectivité humaine les règles du droit positif deviennent, par suite de la carence ou de l'hypertrophie du pouvoir, inopérantes ou arbitraires, le sentiment de la justice, qui ne déserte jamais leur cœur, porte les hommes à regarder plus haut, pour raccrocher l'espoir de leur salut à des préceptes supérieurs et permanents, que les anciens Grecs appelaient les lois non écrites.*'[9] The death of natural law may be proclaimed. In truth it never dies, since the idea(l) of a moral truth beyond the brute facts of reality is a inescapable axiom of human thought and of human striving.

[7] *Ibid.*, at 10.

[8] *Ibid.*, at 12, 14, 18.

[9] N. Politis, *La morale internationale* (1943), at 7.

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5 Weaknesses of Sociological Theories

The sociological theories of the beginning of the 20th century, still quite rudimentary and all too optimistic, had two essential pitfalls.

First, the sometimes radical monism between the 'is' and the 'ought'. Why should all that is effectively being practised at a given time in the spontaneous interaction of social forces also represent what ought to be? Why can we say that members of society are bound by such rules? Can that which is bear in itself its own justification? This monism between effectiveness and the normative injunction tends to erode distinctions and criticism. Effectiveness becomes all: law (an 'ought') is deduced from the 'is' (facts of social life). Legitimacy and justice tend to be put aside – these are indeed partly metaphysical notions. However, it seems that they can never be completely put aside in the law, which is a cultural or finalist, and not just a causal or scientific, phenomenon? Manifestly, the 'juridical consciousness', in which feelings of justice and appropriateness have some place, somewhat relaxes the tension in the writings of Duguit and Politis. But these quite short and vague allusions do not completely dispose of the problem.

Secondly, the formal expression of the law is weakened, if not dissolved, in the vague space of social effectiveness. The social regularities invoked may be convenient for the political scientist. They are too vague for the lawyer. How will he determine the applicable law in a given case? The sociological school here needs the complement of a well-equipped doctrine of formal sources, i.e., of a well articulated positive law body. For the functioning of the law the legislator hence still plays a fundamental role. Some degree of 'positivism' thus also remains unavoidable in the realm of the sociological theories (as it does in natural law theories). In the end, these constructions and conceptions of the law can offer a definite solution only for the basis of obligation in international law, but not for the day-to-day working of this complex and articulated legal order.

For these reasons, sociological theories such as those exposed at the beginning of the 20th century remained a parenthesis in the doctrinal history of international law. They inspired other schools of law and were thus developed, but not maintained as such by modern authors.

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