

Sociology and International Law: some historical connections

Wickham, Gary

Professor of Sociology

Murdoch University

Email: G.Wickham@murdoch.edu.au

Abstract

Sociology and international law are closely related. Both fields were formalised as disciplines in the second half of the nineteenth century, though this is not the source of their closeness. Rather, they are closely related because of their joint reliance on the notion of the social. Both made much use of an organic-communitarian understanding of the social and in both a counter-current arose against this direction, around a distinctly politico-legal understanding. In building its organic-communitarian tradition, international law actually borrowed heavily from the sociological discourses of the time, particularly from the work of Durkheim. The borrowings concerning the politico-legal tradition, however, ran the other way, with sociology borrowing from those public law discourses about sovereignty that informed most discourses of international law. The paper sketches the main method involved, sets out each of the two aforementioned rival understandings of the social, discusses international law's use of the organic-communitarian understanding, and discusses sociology's borrowing from public law in deploying a politico-legal understanding through the notion of sovereignty.

Keywords: the Social, Sovereignty, State, Organic, Communitarian, Politico-legal

Introduction

Sociology and international law are closely related. Both fields were formalised as disciplines in the second half of the nineteenth century, though this is not the source of their closeness. Rather, they are closely related because of their joint reliance on the notion of the social. Both made much use of an organic-communitarian understanding of the social and in both a counter-current arose against this direction, around a distinctly politico-legal understanding. In building its organic-communitarian tradition, international law actually borrowed heavily from the sociological discourses of the time, particularly from the work of Durkheim. The borrowings concerning the politico-legal tradition, however, ran the other way, with

sociology borrowing from those public law discourses about sovereignty that informed most discourses of international law.

The first section will sketch the main method involved, the second will set out each of the two aforementioned rival understandings of the social, the third will discuss international law's use of the organic-communitarian understanding, and the fourth will discuss sociology's borrowing from public law in deploying a politico-legal understanding through the notion of sovereignty.

Method

My argument here draws on a method called contextualist historiography. This method was founded by the then-Cambridge historian of political thought J.G.A. Pocock, particularly with the 1957 publication of his seminal book, *The Ancient Constitution and the Feudal Law* (1987). Pocock is still working and remains one of the two most prominent advocates of the method, the other being Quentin Skinner, another member of the so-called Cambridge School. Other prominent advocates include the Australian historian of humanities discourses, Ian Hunter, and the American historian of sociology, Stephen Turner. All four scholars have written substantive histories that use the method (for example: Hunter 2001; 2006; 2007b; Pocock 1975; 1987; Skinner 1978; 1996; Turner 1986; 1994; 2007; Turner and Turner 1990), while three have written essays specifically discussing the method (for example: Hunter 2007a; 2008; 2009); Pocock 1981; 1985; 1988; Skinner 2002). I should add that I have sought to use this method in some of my recent pieces (Wickham 2006a; 2006b; 2007; 2008b; 2008c; Wickham and Evers 2009; Wickham and Freemantle 2008) and I have published one methodologically focused essay on it (Wickham 2008a).

The method is distinctive in the degree to which it insists on historicising its objects. Crucially, the method does not exclude its own mode of history writing from the spotlight, always situating itself in the politics of different contests about the uses of history writing. In *The Ancient Constitution and the Feudal Law*, for example, Pocock not only details the long-running historical dispute as to whether, on the one hand, Britain's constitutional foundations were so tied up in their ancient cultural, British roots as to be from time immemorial, or, on the other, were largely put in place in the wake of the conquest of 1066 and so contain many themes of continental political thought. He also traces the ways in which a mode of history writing founded in Lockean thinking about the universality of human reason has sought to keep at bay a rival mode, which sees the complexities of political disputes in their contexts as far more important than philosophical notions like universal reason. And, moreover, he makes plain that his effort is itself a salvo fired on behalf of the 'complexities of political disputes' mode against the 'philosophical universals' mode.

The organic-communitarian and politico-legal understandings of the social

Recent historical research into the 'socio' disciplines (as well as the aforementioned pieces by Turner, see esp.: Harley 2008; Hunter 2006; 2007a; 2007b; 2007c; 2008; Isaac 2008; 2009a; 2009b; Joyce 2002; Wagner 1994), particularly sociology, is helping to show that the very idea of the social has in fact been doing far more work in these fields than the standard usage of the term 'social' – as 'human interaction' *per se* – suggests.

The organic-communitarian tradition understands the social in terms of organic bonds, so deeply rooted in the particular culture of a region, and in the morality of that culture, that they are effectively beyond time. The tradition believes that an organic

moral consensus is at the centre of society. Reason has a role in morality, but only when it is expressed collectively, as the reason of an organically-formed community. The organic moral consensus of the community decides which moral goods produce society, government, and law, insisting that individuals be always considered only as members of the organically-formed communities.

The rival politico-legal tradition understands the social as a hard-won historical achievement. It owes most to a group of diverse early modern thinkers, especially Hugo Grotius, Jean Bodin, Thomas Hobbes, Samuel Pufendorf, and Christian Thomasius (see esp.: Bodin 1962; Grotius 1925; Hobbes 1845; Pufendorf 2003; Thomasius 2007) and to the few government leaders of the time who took up at least some aspects of their thinking. The tradition emerged out of the attempt by these thinkers and leaders to overcome the then-pressing problem of competing religious-moral principles-for-governing, which were being used as doctrinal weapons by opposing religious communities, each claiming that their particular principles were the only ‘true’ and ‘natural’ ones. This clash of doctrinal weapons became widespread civil war, especially in England, France, Germany, and the Netherlands, during various parts of the sixteenth and seventeenth centuries, with loss of life of such magnitude that there was a serious risk that whole populations would be wiped out.

In other words, the daunting question facing those who sought at the time to find ways to govern the effected territories in line with this-worldly ends, as opposed to those who wanted to govern them mainly with an eye to the best path to the next world, was, ‘How can we stop the killing in such a way as to allow subjects to interact without the threat of deadly violence constantly hanging over their heads?’. The single instrumentalist norm contained in this

question – attaining and maintaining civil peace, a norm developed by the very particular combination of politics and law that produced both the notion of sovereignty and with it the modern state – remains the key to grasping this particular account of the social, which I therefore sometimes also call the civil-peace understanding.

In short, for the politico-legal or civil-peace understanding, the social is the domain of relative freedom and safety that emerged in the early modern period in England, France, Germany, and the Netherlands, and later became a feature in many other countries (the USA, nearly all European countries, Australia, Canada, New Zealand, and a number of Asian and African countries as well). The level of freedom and safety involved is relative to what went before the civil-peace interventions and to what exists in the countries where these interventions have not occurred or have been rebuffed. Inasmuch as it does not deny its own history – insisting on empirical techniques in producing knowledge, including knowledge of its own history – this understanding is not and has never been a marker of any universal moral position. It is instead a marker of the relegation of morality. Under the civil-peace style of governing, different moralities are recognised as vital measures of and guides for human conduct, but morality, in any form, is not allowed to occupy centre stage, it has had to be moved away from the spotlight, where it was causing so much mayhem. Under this style of governing, this is to say, disputes about morality are dealt with in a private sphere, a sphere compelled, by the governing forces, to operate in line with the commands of each territory's sovereign (whether an individual or an assembly), who or which is sovereign only because of his, her, or its capacity to impose civil peace. In other words, under this form of rule, the private sphere of morality is one in which different communities can debate rival moral creeds to their hearts' content, but only

so long as they do not threaten civil peace, only so long, that is, as they do not resort to violence or the threat of violence, just as the private sphere of religion – now having had its previously automatic link to morality broken – is one in which different religious communities can debate rival paths to salvation to their hearts' content, but only so long as they do not threaten civil peace. This is a crucial marker of civil-peace governments: they are not concerned with people's inner thoughts or feelings, only with their external behaviours. As Pufendorf put it in the 1680s, 'the compass of Peoples Thoughts, without breaking out into publick or outward Actions, they are not punishable by the Law, neither can any Humane Power take Cognizance of what is contained only, and hidden in the Heart' (Pufendorf 2002: 20).

The idea that the state might have a role as a neutral force for achieving civil peace, by using the law to prevent each and every community from imposing its particular morality on the others, is anathema to organic-communitarian thinkers. This anti-state feature of the organic-communitarian tradition is well illustrated in the work of Roger Cotterrell, a Durkheimian sociologist of law. He insists that 'law's ultimate authority' lies in the morality of the organically-formed community. He urges his readers to 'reassert links between law and morality, viewing morality as the varied conditions of solidarity necessary to the diverse kinds of relations of community that comprise the social', and, even more, to engage in a 'powerful moral critique of law' (Cotterrell 2002: 638-43).

This is to introduce the idea that the organic-communitarian way of thinking about the social is part of a fight-back against the civil-peace understanding. This fight-back began almost as soon as the civil-peace thinkers had, in the second half of the seventeenth century, effectively brought one hundred and fifty years of civil war to an end. Against the civil-peace thinkers' strictly empirical methods, and against the

politics-law-sovereignty-state equilibrium that they helped bring into existence, a metaphysical, anti-state counter-attack was launched and has never subsided (see esp.: Hunter 2001). It now takes many different forms, including the organic-communitarian form.

International Law's use of the organic understanding of the social

In his (2001) book on the rise and fall of international law between 1870 and 1960, Martti Koskenneimi investigates, *inter alia*, the ways in which a number of different strands of the organic-communitarian tradition of thinking about the social came to dominate discourses of international law in the late-nineteenth and into the twentieth century. I say 'a number of strands' with some understatement. Koskenneimi in fact deals with a dazzling array of positions, especially from Germany and France, which all contributed to the impact of organic-communitarian social thinking on the development of international law. In Germany the contribution of Savigny was crucial: 'For Savigny, law emerged and was connected to the *Volksgeist* like language, not as abstract rules but as living institutions'. By this account, this 'emerged' law was soon so strong as to be able to cover many communities, with no regard for national boundaries, a community being 'neither a raw nation nor a bundle of free-floating individuals but an institution and a history' (2001: 43, 44). In Savigny's wake came many others (2001: 42-47). For such thinkers, society produced sovereignty, not the other way around: 'it was not for Parliaments or sovereigns to enact written laws' their job was simply to understand and act upon 'the living law of the people' (2001: 47).

Of even more interest to me here is Koskenneimi's account of the French attempts to impose an organic-communitarian account of the social onto international law,

attempts which were undoubtedly related to what was happening in Germany, Britain, and other European countries, but which, especially after the Franco-Prussian War, were offered as if they were uniquely French. Koskenneimi writes about the commitment of figures such as Renault, Fauchille, and Bonfils to the idea that the very basis of international law is to be found in ‘the shared habits and common culture of civilized nations’ (2001: 280), but he focuses especially on the solidarist positions of the likes of Duguit, Alvarez, and Scelle, all of whom built on Durkheim’s proposition that morality is delivered collectively by organic-communitarian solidarity and in this way sustains society as a whole (2001; 297-298). Duguit insisted that law, particularly international law, owed nothing to the state, which he saw as little more than ‘a kind of political arm of social solidarity’ (2001: 300). Alvarez took the Durkheim-Duguit package and tried to work it into a complete system for international relations, featuring the idea of a very widespread *conscience collective* (2001; 302-305).

In the period after World War I Scelle became the leading proponent of solidarist thinking. He produced one of the more extreme organic-communitarian accounts of the law-society relation: ‘positive law was a (more or less successful) translation of the objective laws of solidarity’; once the ‘scientific’ understanding of the organic bonds that made both society and law a single entity was taken up by government officials, legislation would more or less write itself; each layer of society-law (communal, national, international) would slowly emerge and find its place, for ‘the more inclusive ones overrode the less inclusive ones. For example, treaties automatically overrode conflicting national law’, the ‘law of humanitarian intervention, being a law of international society, overrode national sovereignty’ (2001: 331-332).

Sociology's borrowing from public law in deploying a politico-legal understanding of the social through the notion of sovereignty

The first thing that needs to be emphasised in this section is that while there is a solid politico-legal tradition within sociology, it has endured a very low profile since the middle of the twentieth century. Especially important is that branch of Weberian sociology that focuses on Weber's work on politics and law and on his insistence that sociologists take responsibility for their political positions (see esp.: Aron 1988; Hennis 1988; Turner 2009; Turner and Factor 1984; 1987; 1994; Weber 1954; 1994).

Public law is a form of law developed to assist in the this-worldly rule of particular territories – in direct opposition to the idea that law should serve mainly to assist in the universal salvation of souls towards life in the next world. I turn first to Martin Loughlin's useful guide, *The Idea of Public Law* (2003). For Loughlin, 'the basic tasks of public law ... can briefly be defined as those concerning the constitution, maintenance and regulation of governmental authority'. He expands upon this point to say that public law is concerned only with that type of government – the type I am called modern civil-peace government – which seeks to provide 'security, liberty, and prosperity' (Loughlin 2003: 1).

In this context, Loughlin (2003: 92) defines sovereignty as 'an institutional framework established for the purpose of maintaining and promoting peace, security, and the welfare of citizens'. This provides a useful starting point for my discussion of sovereignty's role in creating and maintaining the social as a domain of civil peace. To build on Loughlin's definition I turn to some points from Hobbes, points which speak directly to sovereignty's essentially social character (the points are drawn from three different volumes of Hobbes's *English Works*; Hobbes 1845a, b, c). Hobbes

takes great pains to show that a sovereign, whether an individual or an assembly, is not at all the same thing as a 'private man' or a group of 'private men' (1845b: Dedication). A sovereign, he argues, is a public common power who or which stops 'private men' – by keeping 'them all in awe' – from doing to one another 'a great deal of grief'. Humans are capable of causing so much grief to one another, Hobbes famously argues, as to constitute 'a war ... of every man, against every man' (1845b: 112-113). In order to achieve the status of sovereign, he goes on, an individual or assembly must publicly be made sovereign by the covenants of the subjects (1845b: 161; 1845a: 101). In line with this vital condition, it is not important to Hobbes, in a strictly intellectual sense, which man, woman, assembly, or part of an assembly is made sovereign, for in every case the individual or assembly immediately becomes a (singular) public 'person', the 'representative of all and every one of the multitude', the 'person' who or which always carries the force of the multitude (1845b: 171; 1845a: 140, 158). He, she, or it carries this force because, when 'the major part hath by consenting voices declared a sovereign; he that dissented must now consent with the rest' (1845b: 162; 1845a: 73-74). In this way, sovereign power is only as strong as the multitude can imagine it to be (1845b: 195, 346; 1845a: 88). A further aspect of a sovereign's character is that everything a sovereign does must be understood, by the subjects, to be for the ultimate public good – 'the common peace and security' (1845b: 235).

Loughlin regards Hobbes's interventions on representation as an especially important step on the road to the cultivation of sovereignty-as-institutional-framework, the type of sovereignty that lies at the heart of modern civil-peace government and hence of the maintenance of the social. Representation, in being central to sovereignty, provides 'the structural unity of public law', it helps to ensure that 'certain standards

are attached to, and certain limits imposed on, the office of the representative’, and it ‘emphasizes the fact that public law deals mainly with duties that attach to such offices’ (Loughlin 2003: 57).

In sum, what is being argued in this section is that sovereignty, public law, and the modern state emerged as parts of the same package of developments – a package driven by the tense politics-law relation – that helped to overcome the crippling effects of ongoing religious civil war, thereby creating, for those living in the countries where the developments occurred, a domain of much greater freedom and safety: the social.

References

- Aron, R. (1988) ‘On the historical condition of the sociologist’ in D. Schnapper (ed.) *Raymond Aron: Power, Modernity and Sociology*. Aldershot: Edward Elgar, pp. 211-231.
- Bodin, J. (1962) [1576] *The Six Bookes of a Commonweale*, trans. R. Knolles, ed. K.D. McRae. Cambridge, MA: Harvard University Press.
- Cotterrell, R. (2002) ‘Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies’ *Journal of Law and Society* 29:4, pp. 632-644.
- Grotius, H. (1925) [1625] *The Law of War and Peace*, trans. F.W. Kelsey. Oxford; Clarendon Press.
- Harley, K. (2008) ‘Theory use in introductory sociology textbooks’ *Current Sociology* 56:2, pp. 289-306.
- Hennis, W. (1988) *Max Weber: Essays in Reconstruction*, trans. K. Tribe. London: Allen and Unwin.
- Hobbes, T. (1845a) *The English Works of Thomas Hobbes of Malmesbury, Volume II: Philosophical Rudiments Concerning Government and Society*.
- Hobbes, T. (1845b) *The English Works of Thomas Hobbes of Malmesbury, Volume III: Leviathan: or the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil*.
- Hobbes, T. (1845c) *The English Works of Thomas Hobbes of Malmesbury, Volume IV: De Corpore Politico, or the Elements of Law* (among other works).
- Hunter, I. (2001) *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany*, Cambridge, Cambridge University Press.
- Hunter, I. (2006) ‘The History of Theory’ *Critical Inquiry* 33:4, pp. 78-112.
- Hunter, I. (2007a) ‘Natural Law, Historiography, and Aboriginal Sovereignty’ *Legal History* 11, pp. 137-167.

- Hunter, I. (2007b) 'The History of Philosophy and the Persona of the Philosopher' *Modern Intellectual History* 4, pp. 571-600.
- Hunter, I. (2008) 'The Desire for Deconstruction: Derrida's Metaphysics of Law' *Communication, Politics & Culture* 41:1, pp. 6-29.
- Hunter, I. (2009) 'Spirituality and philosophy in post-structuralist theory' *History of European Ideas* 35:2, pp. 265-275.
- Isaac, J. (2008) 'The Harvard Pareto Circle Revisited' unpublished paper presented to the Cambridge Seminars in Political Thought and Intellectual History series, Series 2, 27 October 2008.
- Isaac, J. (2009a) 'Tangled Loops: Theory, History, and the Human Sciences in America' *Modern Intellectual History*, forthcoming.
- Isaac, J. (2009b) 'Theorist at Work: Talcott Parsons and the Carnegie Project on Theory, 1949-1951' *Journal of the History of Ideas*, forthcoming.
- Joyce, P. (ed.) (2002) *The Social in Question: New bearings in history and the social sciences*. London: Routledge.
- Koskenneimi, M. (2001) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge: Cambridge University Press.
- Loughlin, M. (2003) *The Idea of Public Law*. Oxford: Oxford University Press.
- Loughlin, M. 2009 'In Defence of *Staatslehre*' *Der Staat* 48:1, pp. 1-27.
- Pocock, J.G.A. 1971 *Politics, Language, and Time: Essays on Political Thought and History*. New York: Atheneum.
- Pocock, J.G.A. (1975) *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Princeton, NJ: Princeton University Press.
- Pocock, J.G.A. (1981) 'The Machiavellian Moment Revisited: A Study in History and Ideology' *The Journal of Modern History* 53:1, pp. 49-72.
- Pocock, J.G.A. (1985) 'The History of British Political Thought: The Creation of a Center' *Journal of British Studies* 24:3, pp. 283-310.
- Pocock, J.G.A. (1987) *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect*. Cambridge: Cambridge University Press.
- Pocock, J.G.A. (1988) 'Transformations in British Political Thought' in Mark Francis (guest ed.) 'Theory in History: English Political Thought, 1640-1832' *Political Science* 40:1, pp. 160-178.
- Pufendorf, S. (2002) *On the Nature and Qualification of Religion in Reference to Civil Society*, ed. S. Zurbuchen. Indianapolis: Liberty Fund.
- Pufendorf, S. (2003) [1673] *Samuel Pufendorf: The Whole Duty of Man According to the Law of Nature, Together with Two Discourses and a Commentary by Jean Barbeyrac*, ed. I. Hunter and D. Saunders. Indianapolis: Liberty Fund.
- Skinner, Q. (1978) *Foundations of Modern Political Thought*, 2 vols. Cambridge: Cambridge University Press.
- Skinner, Q. (1996) *Reason and Rhetoric in the Philosophy of Hobbes*. Cambridge: Cambridge University Press.
- Skinner, Q. (2002) *Visions of Politics I: Regarding Method*. Cambridge: Cambridge University Press.
- Thomasius, C. (2007) *Essays on Church, State, and Politics*, ed., intro. I. Hunter, T. Ahnert, and F. Grunert. Indianapolis: Liberty Fund.
- Turner, S. (1986) *The Search for a Methodology of Social Science*. Dordrecht: Reidel.
- Turner, S. (1994) 'The origins of "mainstream sociology" and other issues in the history of American sociology' *Social Epistemology* 8:1, pp. 41-67.
- Turner, S. (2007) 'Defining a Discipline: Sociology and Its Philosophical

- Problems, from Its Classics to 1945' in S. Turner and M. Risjord (eds) *Philosophy of Anthropology and Sociology*. Amsterdam: Elsevier, pp. 3-69.
- Turner, S. (2009) 'Hans J. Morgenthau and the Legacy of Max Weber' in Duncan Bell (ed.) *Political Thought and International Relations: Variations on a Realist Theme*. Oxford: Oxford University Press, pp. 63-82.
- Turner, S.P. and R.A. Factor (1984) *Max Weber and the Dispute Over Reason and Value*. London: Routledge and Kegan Paul.
- Turner, S.P. and R.A. Factor (1987) 'Decisionism and Politics: Weber as Constitutional Theorist' in S. Lash and S. Whimster (eds) *Max Weber, Rationality and Modernity*. London: Allen and Unwin, pp. 334-354.
- Turner, S.P. and R.A. Factor (1994) *Max Weber: The Lawyer as Social Thinker*. London: Routledge.
- Turner, S.P. and J.H. Turner (1990) *The Impossible Science: An Institutional Analysis of American Sociology*. Newbury Park, CAL: Sage.
- Wagner, P. (1994) *A Sociology of Modernity: Liberty and Discipline*. London: Routledge.
- Wickham, G. (2006a) 'Foucault, Law and Power: A Reassessment' *Journal of Law and Society* 23:4, pp. 596-614.
- Wickham, G. (2006b) 'The Law-Morality Relation Revisited: A Challenge to Established Traditions by the Australian Sceptical Approach' *Griffith Law Review* 15:1, pp. 27-48.
- Wickham, G. (2007) 'Expanding the Classical in Classical Sociology' *Journal of Classical Sociology* 7:3, pp. 243-265.
- Wickham, G. (2008a) 'Competing Uses of History in Researching the Social: A Reply to Peter Baehr' *Current Sociology* 56:6, 953-958.
- Wickham, G. (2008b) 'The Social Must Be Limited: Some Problems With Foucault's Approach to Modern Positive Power' *Journal of Sociology* 44:1, pp. 29-44.
- Wickham, G. (2008c) 'Protecting Law from Morality's Stalking Horse: The "Socio" in Socio-Legal Studies' *Law, Text, Culture* 12, pp. 104-127.
- Wickham, G. and B. Evers (2009) 'Society, State, Security, and Subject Formation' in A. Yeatman and M. Zolkos (eds) *State, Security and Subject Formation*. New York: Continuum (forthcoming).
- Wickham, G. and H. Freemantle (2008) 'Some Additional Knowledge Conditions For Sociology' *Current Sociology* 56:6, pp. 925-942.