

Social theory ii durkheim

Sociology



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Social Theory II — Durkheim Required reading: PSN, pp. 265-278, and R. Cotterrell, Emile Durkheim: Law in a Moral Domain (1999), Ch 7 (photocopied handout) Q: How far would Durkheim agree and disagree with Marx's view of law? Q: Does modern law need a set of values to underpin it? Can sociology explain what values modern law must express? What answer to these questions does Durkheim give? Q: If Durkheim 'got legal evolution wrong' does this destroy the significance of his view of law? PSN, pp. 265-278

Though Durkheim was a contemporary of Weber, his work was vastly different. Both Marx and Weber are usually referred to as conflict theorists. They understood that any social order involved the regulation of opposing interests, and, as a result, that conflict between individuals and among groups was an essential part of every society. Durkheim begins with a very different premise. His approach is usually called functionalism. The functionalist view focuses on the role of social objects or actors, that is, on what they do. Durkheim believed that harmony, rather than conflict, defined society. He examines social phenomena with regard to their function in producing or facilitating social cohesion. Whereas Weber was preoccupied with rationality, Durkheim is primarily concerned with solidarity: what holds individuals together in social institutions? Durkheim believed that solidarity was the normal condition of society, and even though he recognized the turmoil associated with industrialization, he considered conflict abnormal or pathological. Law played a central role in Durkheim's analysis of social development, although it was not his primary interest. His abiding concern was with understanding the nature and sources of social solidarity and cohesion, in particular in the problematic context of modern industrial societies. Since Durkheim's work is focused on understanding social order he

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devotes much attention to the analysis of deviance and law-breaking. Law came to play a vital part in Durkheim's account of modern societies not for its own sake, however, but because he saw law as the crucial empirical indicator of social solidarity, his overriding concern. " Since law reproduces the principal forms of social solidarity, we have only to classify the different types of law to find therefrom the different types of social solidarity which correspond to it. " In Durkheim's first book *The Division of Labour*, he developed a distinction between two types of social solidarity, mechanical and organic. This book tried to show that societies are real and that the reality of societies lay in something that Durkheim calls " solidarity".

â†' Mechanical solidarity is characterised by all individuals uniformly sharing the same values, belief and roles, a common conscience collective. This model was attributed by Durkheim to simpler societies with only a rudimentary division of labour. â†' Organic solidarity by contrast is based on the mutual interdependence of different units in societies with a highly developed division of labour. Durkheim's key argument was that organic solidarity was the only type possible in complex and differentiated modern societies. Durkheim's concern was to understand the barriers and the possible pathways to the achievement of this form of solidarity, against the background of the processes creating conflict, tension and anomie in modern societies. Durkheim claimed that law was the 'visible symbol' of solidarity. This was based on a conception of law as an expression of social consensus, a reflection of shared sentiments and values, so that 'we can thus be certain of finding reflected in law all the essential varieties of social solidarity'. This seems to rule out of account the possibility of law being an arena of conflict or the expression of power as Marx saw it. Durkheim distinguished between

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two types of legal sanctions, arguing that they corresponded in turn to the two forms of solidarity: Repressive sanctions involved the infliction of suffering or loss to avenge violations of the law. It was characteristic of mechanical solidarity, expressing the strong, shared sentiment of such societies. It is enforced by penal sanctions which 'consist essentially in suffering or at least a loss, inflicted on the agent'. Restitutive sanctions involved only the restoration of the status quo that had been disrupted by legal violation, the 're-establishment of troubled relations to their normal state', with no infliction of harm on the violator beyond that ('consists only of the return of things as they were'). It is concerned with the regulation and co-ordination of the complex relations arising out of the division of labour, not with avenging violations of the shared sentiments and norms of a conscience collective. It involved the specialised personnel, organisational machinery and elaborated rules and procedures of a modern legal system. The main line of criticism of Durkheim's work on legal evolution has been the same for over a century: he got his facts wrong. Anthropological evidence suggests that the simplest societies, with little division of labour, were not characterised by harsh repressive sanctions but on the contrary by order maintenance through a variety of informal processes. Schwartz and Miller specifically interpret this as a refutation of Durkheim's claim that 'penal law... occurs in societies with the simplest division of labour.' On the contrary, their 'data show that police are found only in association with a substantial degree of division of labour... By contrast restitutive sanctions — damages and mediation — which Durkheim believed to be associated with an increasing division of labour, are found in many societies that lack even rudimentary specialisation. Thus Durkheim's hypothesis seems the reverse

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of the empirical situation.' More fundamentally damaging to Durkheim's perspective is Spitzer's finding that social complexity tends to produce greater social divisions and conflict, and hence more repression, rather than increasing cohesiveness and restitutive law as Durkheim's model of organic solidarity implied. Spitzer concludes that the evolution of punishment is curvilinear: 'Sanctions are lenient in simple egalitarian societies, severe in non-market complex societies, and lenient in established market societies'. Another review of anthropological literature, by Robinson and Scaglione, concluded similarly that the emergence of specialised policing institutions was primarily related to the growth of 'economic specialisation and differential control of resources'. The notion of organic solidarity was not intended to be an accurate depiction of how industrial societies had actually evolved, but as an 'ideal-type' of the only kind of solidarity that Durkheim thought possible in complex and differentiated modern societies. Durkheim's key point was that the division of labour produced factual interdependence between people at the same time as it generated social differences. The ethic appropriate for this was one of mutual respect and toleration of diversity not the enforcement of a monolithic morality. As an account of what has actually happened Durkheim's picture of legal evolution has been refuted many times, but as an agenda for a possible future it retains its power. The following extract from Reiner provides a summary of the critical debate sparked off by Durkheim's analysis: Law was a fundamental concept in Durkheim's first book where his main concern was with understanding the problems and preconditions of social solidarity in complex, differentiated, industrial societies. In 'mechanical' solidarity notions of individual difference, rights and responsibilities are only weakly developed, if at all. Solidarity of

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such societies is mechanical in that it arises from the similarity of the different atoms constituting the whole. Although organically solidarity societies do not have a pervasive collective conscience like that associated with mechanical solidarity, the practical interdependence arising out of the division of labour, if combined with an appropriate social ethic recognizing and based upon respect for the individual differences produced by specialized functions, could bind such societies into tightly knit, albeit differentiated social organisms. Durkheim observes that 'social solidarity is a completely moral phenomenon which, taken by itself, does not lend itself to exact observation nor indeed to measurement.' Empirical research requires an externally observable and measurable indicator of solidarity, which cannot be directly apprehended in itself. 'We must substitute for this internal fact which escaped us an external index which symbolises it and study the former in the light of that latter. This visible symbol is law.' Law itself is not explicitly defined by Durkheim. But the implication is that law is the set of rules which are more or less formally promulgated and enforced in a society. What is tendentious is the direct linking of law to the moral consensus of a society. Having established to his satisfaction that 'law reproduces the principal forms of social solidarity', the next task for Durkheim is 'to classify the different types of law to find therefrom the different types of solidarity which correspond to it'. He finds this in the essential character of law as 'sanctioned conduct', and develops a distinction between two forms of legal sanction which correspond to the two types of social solidarity. Durkheim's theses about law stimulated a debate about their empirical validity which still flourishes today. Durkheim states blithely that 'it will suffice, in order to measure the part of the division of labour, to compare the number of

juridical rules which express it with the total volume of law'. However, calculating the 'volume of law' is not a reliable, nor certain or easily feasible process. Crime thus defined is a universal feature of all societies argues Durkheim. Through the punishment of offenders not only are the moral boundaries of the community clearly demarcated, but the strength of attachment to them is reinforced. Punishment strengthens social solidarity through the reaffirmation of moral commitment among the conforming population who witness the suffering and expiation of the offender. Durkheim adds another line of reasoning in his later treatment of crime as a 'normal' rather than 'pathological' feature of societies in *The Rules of Sociological Method*. ... Crime is the precondition and the proof of a society's capacity for flexibility in the face of essential change. The conclusion of Durkheim's argument is that contrary to the conventional view that crime is a social pathology that must be eradicated, it is a normal and inescapable phenomenon which can play a useful part in facilitating social progress. The best-known and most fully articulated study of a specific kind of deviance is his celebrated *Suicide*, but Durkheim also offers a rather more cursory account of homicide in *Professional Ethics and Civic Morals*. Durkheim's basic concern is to demonstrate that the rate of suicide is a function of the general state of social integration and regulation. His two basic types of suicide, egoistic and anomic, are results of the breakdown of social integration and regulation respectively. Both are symptomatic of a failure of economic development and the division of labour to produce that organic solidarity which Durkheim anticipated as the normal condition of industrial societies. A decade after his initial treatment of legal evolution in *The Division of Labour*, Durkheim returned to the subject in his essay on 'Two laws of penal

evolution', which contains his most developed statement on law, crime and punishment. In this essay Durkheim seeks to establish and explain two laws which he claims have governed the evolution of the apparatus of punishment. The first, which he calls 'the law of quantitative change', he formulates thus: 'The intensity of punishment is the greater the more closely societies approximate to a less developed type — and the more the central power assumes an absolute character.' The second law, of 'qualitative changes', is formulates as: 'Deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control'. The reforms associated with the liberal utilitarians involved not only quantitative declines in harshness of punishment, but the qualitative change to imprisonment as the dominant penal techniques which Durkheim enshrines as his second law. In explaining the laws Durkheim argues that changing forms of punishment are due to changes in the character of crime, which in turn is related to the form of social solidarity and conscience. 'Since punishment results from crime and expresses the manner in which it affects the public conscience, it is in the evolution of crime that one must seek the cause determining the evolution of punishment'. 'offence of man against man cannot arouse the same indignation as an offence of man against God' The result is that 'Seeing as, in the course of time, crime is reduced more and more to offences against persons alone, while religious forms of criminality decline, it is inevitable that punishment on the average should become weaker.' The argument that harshness of sanctions is related to absolutist state power allows him to modify his claim that punishment is completely determined by social structure. Durkheim's account of the second law is altogether sketchier and <https://assignbuster.com/social-theory-ii-durkheim/>

subordinate to the first, and he fails to develop in any serious or sustained way the obvious inter-connections between imprisonment and utilitarian penal philosophy which would be consonant with his general conception of modern society. He ends rather limply with the vague call for new forms of penal institution to be 'born which correspond better to the new aspirations of the moral conscience'. ... The nub of the criticism of Durkheim's thesis has been that he simply got his facts wrong. Barnes wrote: 'the main weakness... is that the ethnographic evidence shows that, in general, primitive societies are not characterised by repressive laws'. As Sheleff put it: 'Durkheim was probably right in his theoretical premise that the law is the visible outer symbol of the nature of society. He was almost certainly wrong in his empirical assessment of the direction of the law from repressive to restitutive.' The most important deficiency in Durkheim's account of legal evolution is one that he partially acknowledged in the later formulation in 'Two laws' but which remains only sketchy and undeveloped: the relation between the state and law. Some writers have even claimed that Durkheim completely abandoned his view on legal evolution after the first publication of *The Division of Labour* in 1893, as evidenced by the fact that he never again uses the distinctions mechanical versus organic solidarity or repressive versus restitutive law in his later work. What is evident is that Durkheim did come to see the evolution of law and punishment as related not only to social structure and morality, but also to state power, conceived of by him as an independent variable. The thesis of the 'Two laws of penal evolution' remains unsatisfactory. Durkheim's overriding theoretical and moral/political concern and project was to identify and understand the problems and prospects of achieving social solidarity in complex and differentiated

societies. The evolutionary flavour of Durkheim's account arises in part because he was anxious to depict organic solidarity not as a remote utopian ideal but as the culmination of virtual tendencies which could already be discerned. *** At the start of the second millennium we are living through as profound a change in social order throughout the world as the advent of modern industrialisation which formed the crucible for the development of classical social theory. R. Cotterrell, *Emile Durkheim: Law in a Moral Domain* (1999) Durkheim insists that law does not develop from the pursuit of private advantage. It is a matter of morality and solidarity, not of the compromise of interests. Hence the problem of the moral basis of restitutive law must be solved. Exploring this issue allows us to identify a problem that may explain why Durkheim ceased to use the terms 'repressive law' and 'restitutive law' in explanation after *The Division of Labour*. Modern law: the early thesis In *The Division of Labour* Durkheim suggests that rules emerge automatically from social conditions as societies become more complex. Restitutive law is not inspired by the collective consciousness. This law, which expresses and fulfils the requirements of specialisation and social differentiation, is produced directly by the division of labour itself in an automatic process. Restitutive law and the values informing it arise as a matter of functional necessity. Restitutive law's growth has nothing to do with shared sentiments of average members of society. Beliefs do not create restitutive law. The source of this law lies in changing social structure. This functional view of restitutive law therefore separates it completely from the collective consciousness. Thus, this law, driven forward by organisational needs of modern society, seems a social rather than a cultural phenomenon — inspired by evolving patterns of social relationships rather than by common

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attitudes or convictions. A further consequence of Durkheim's view is that restitutive law contrasts totally with repressive law. They are wholly different in character. Not only are their sanctioning methods different but so are their sources. Repressive law is rooted in beliefs and sentiments. Restitutive law is not. Repressive law changes its content as the collective consciousness changes. The merit of these ideas is that it identifies, in the advance of the division of labour, a clear sociological cause of restitutive law. But it has problems. The main one is the lack of any clear relation between the collective consciousness and the underlying values of restitutive law. For Durkheim, all law is a special kind of morality, distinguishable by its organisational characteristics but qualitatively inseparable from a broader moral domain. Restitutive law is presented as the guardian and expression of organic solidarity but it is hard to see where it derives any moral force that can unify modern societies. As regards repressive law, his early thesis emphasises the drastic reduction of its significance as a force for social cohesion as it evolves to its modern form. This value is certainly rooted in the collective consciousness, but the argument of *The Division of Labour* is that solidarity in modern societies is not guaranteed by the collective consciousness but by the effects of the division of labour. Thus, Durkheim's early thesis does not explain where modern law finds its moral basis. It is hard to analyse the content of this law in moral terms. Restitutive law is the heart of modern law but its relationship with morality is wholly unclear. Repressive law occupies a very subsidiary position in Durkheim's picture of modern society. Modern law an alternative later thesis? The index thesis implies that solidarity as a social fact automatically creates the law it needs, while the repressive-restitutive distinction implies that this process as

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regards modern law is largely unconnected with beliefs and sentiments. ... To analyse modern law's moral foundations he needed to change his thinking: Instead of shared beliefs and sentiments being treated as peripheral to modern society some such ideas had to be seen as fundamental. The idea that the value of individual dignity could not be unifying social value had to be discarded in favour of a view that emphasised its importance for social cohesion. The lack of any significant relationship between penal law and law concerned with restitution and balancing relationships needed to be replaced with the idea that all modern law is underpinned by a distinctively modern value system. Finally, restitutive law had to be linked with the collective consciousness — or what Durkheim increasingly came to refer to as collective representations. All of these changes of outlook are reflected gradually in his work after the *The Division of Labour*. Durkheim offers no explicit later thesis of modern law alternative to that found in *The Division of Labour*. But he establishes the elements of a different view in his writings. It is reflected in his later view of punishment as a communication process between society and the offender rather than as merely a matter of social condemnation. His changed outlook is expressed also in his developed view of morality, which emphasises the moral autonomy of the individual as well as ideas of duty and attachment. Durkheim changes entirely his view of individualism as a modern value. The morality of restitutive law Robert Nisbet claims that Durkheim's work shows a 'reversal of argument', in do far as he never returned to the organic/mechanical dichotomy after *The Division of Labour*. His focus switched to questions of collective belief, moral authority and community. Bernard Lacroix traces the 'slow suicide' of Durkheim's 'original political

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purpose' of critically explaining the nature of modern society in terms of structural change: that is, in terms of social morphology. Some commentators have been much less ready to accept that there is any significant change in Durkheim's outlook in his later work. Anthony Giddens argues that Nisbet is wrong and that Durkheim never rejected the distinctions that were central to his theses in *The Division of Labour*. But there can be no doubt about his change of view on the importance of individualism. The consequences of his changed thinking are crucial for his outlook on law. To see why it is crucial we should look at Durkheim's efforts in *The Division of Labour* to explain the morality of organic solidarity. Durkheim notes that the special tasks that the morality of specialisation justifies are by their nature exempt from the effects of the collective consciousness. Restitutive law's moral force is said to derive not from popular sentiments but from the specialisation of tasks. Contract law, for example, gains moral power because it is society's means of bringing together different roles or functions and co-ordinating them. Modern law is, according to this view, increasingly a law of management, organisation and co-ordination of social and economic life. It sets and holds the balance across a vast, growing diversity of social activities. The thrust of Durkheim's thinking on restitutive law thus points away from the link between law and morality that we have seen to be fundamental to his general view of the nature of law. It points towards a conception of restitutive law as an instrument of government: a political rather than moral phenomenon. But this direction would make restitutive law an aberrant form of law for Durkheim, just as Fauconnet's analysis portrays modern responsibility as aberrant. It would be a kind of law that has discarded law's fundamental

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character as a form of morality sanctioned in an organised way. Thus, what could be called the governmental morality of organic solidarity is the sole moral basis of restitutive law. The values of this law are those of good management of social complexity, of wise balancing of social roles and functions. The cult of the individual Durkheim's writings a few years after his first book made clear that he had revised his view of the impossibility of a popular morality to unify modern society and its law. Five years after insisting that respect of individual freedom and dignity could not be a genuine social bond, he was claiming that individualism is 'henceforth the only system of beliefs which can ensure the moral unity of the country'. Similarly in Suicide the value of individual worth and dignity becomes a social value after all because it demands respect for all other individuals. It embodies concern for others, not the desire for gratification of the self. It is the value that can provide a secure basis for flourishing social relations of reciprocity and interdependence. What makes individualism a unifying social value, therefore, is primarily its clear distinction from egoism or selfishness. In this sense, almost paradoxically, individualism as a value is impersonal, that is, unspecific to any particular individual but applicable uniformly to all. Durkheim terms this phenomenon the 'cult of the individual'. Now, in modern society, it is the individual personality that has become sacred. Thus the value of individualism, the respect for human worth and dignity, is not something inherent in individual human beings. It is, like all morality, an expression of social conditions, a creation of society. It is this reasoning that allows Durkheim to solve the problem of how a value that stresses the inviolability of personal autonomy can also be one that unites individuals morally in modern society. The cult of the individual as the heart of modern

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morality clearly embodies what we noticed earlier as the distinctively modern component of morality - moral autonomy. But it affirms that the scope of individual freedom and the degree of respect for it is what society gives and prescribes. The idea of the cult of the individual provides for modern law a moral basis in shared values, or values that can at least be officially promulgated as uniting society. The argument, reflected in his later work, now seems to be not that the progress of the division of labour, driven by morphological changes in society, 'automatically' produces restitutive law as a reflection of an underlying social structure. The morality of the cult of the individual thus provides the grounding of modern legal rights. It makes individual rights secure, but it insists that these rights reside in society rather than in the individual as an isolated human being. Individuals are bound to society, and thereby to each other, in networks of responsibility. It is the key to defining personality, the very essence of individuality in modern society. The nature of rights Durkheim insists that rights do not come from birth; they are not inherent in individuals; rights of individuals 'are not inscribed in the nature of things... on the contrary, the rights have to be won from the opposing forces that deny them... the state alone is qualified to play this part'. Thus, rights and their limits are defined by society, acting through the centralised political agency that represents it for the purpose of regulation. There is, however a complex ambiguity here which is very important to Durkheim's conception of rights. Whether or not they are enshrined in law, rights must have a moral basis. The idea that rights are created and given by the state reflects the idea of a governmental morality underlying law which was considered earlier. The allocation and protection of rights is a means by which good government based on moral principle can

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be pursued. But a different conception of a moral basis for modern law emerges in Durkheim's later work to coexist with the ideas of the early thesis. Thus, the popular morality of the cult of the individual seems to provide a simpler, more direct source of ideas of individual rights. In a 1906 discussion Durkheim spoke of rights and liberties as conferred on man by the 'sacredness with which he is invested'. The ambiguity in Durkheim's views concerns the scope of the rights that the cult of the individual inspires. Are these rights determined politically by the state, or culturally as a pure expression of a popular morality evolving in the collective consciousness? It is significant that he gives the state a kind of supervisory role in relation to the cult of the individual. The state acting as voice of the collective consciousness. Hence it might be said that while rights are politically produced by the state, this is done on the basis of a kind of cultural authorisation, legitimising these rights in popular morality. This ambiguous position combining political and cultural sources of rights makes it difficult to decide exactly how the idea of human rights fits into Durkheim's thinking. Durkheim sees the cult of the individual as an evolving moral phenomenon that reflects the progress of human nature and the shaping of personality in modern conditions. Thus, it clearly has a moral existence autonomous from the governmental morality that, according to Durkheim's early thesis of modern law, underpins restitutive law. Thus, on the one hand, modern law is driven forward by moral forces that reflect evolving, general, but far from universal, popular sentiments. On the other hand, its complex moral frameworks are located not in popular attitudes and beliefs but in governmental imperatives for effective management of society to promote and guarantee solidarity. It seems that Durkheim was unsatisfied with his <https://assignbuster.com/social-theory-ii-durkheim/>

early conception of the morality of modern law as a wholly governmental morality unconnected with popular sentiments. On the other hand, the popular morality of the cult of the individual, strongly emphasised in his later work, appears ultimately, in his thinking, to be put under a kind of governmental tutelage of the state. I shall argue, indeed, that Durkheim's ambivalence is justified. It reflects enduring tensions at the heart of modern law. R. Cotterrell, *Emile Durkheim: Law in a Moral Domain* (1999), Ch 7

Durkheim insists that law does not develop from the pursuit of private advantage. It is a matter of morality and solidarity, not of the compromise of interests. This is what makes it meaningful, authoritative, worthy of respect; not mere coercion, but rather coercion that serves values universally understood as socially important. Hence, the problem of the moral basis of modern law must be solved in this chapter. In *The Division of Labour* Durkheim suggests that rules emerge automatically from social conditions as societies become more complex. See

Q: How far would Durkheim agree and disagree with Marx's view of law? Q: Does modern law need a set of values to underpin it? Can sociology explain what values modern law must express? What answer to these questions does Durkheim give? Q: If Durkheim 'got legal evolution wrong' does this destroy the significance of his view of law?