COMMENT – DURKHEIM AND LEGAL EVOLUTION: SOME PROBLEMS OF DISPROOF

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I. THREE "REFUTATIONS" OF A DURKHEIMIAN "THESIS"

In their admirable "Legal Evolution and Societal Complexity," Professors Schwartz and Miller (1964: 161) expressed doubts about the validity of Durkheim's (1933: 68-174) well known generalization that repressive sanctions characterize a society based on organic solidarity; as distinct from one based on a complex division of social labour, in turn characterized by restitutive, rather than repressive, sanctions. Although Schwartz and Miller express considerable diffidence in their views on the invalidity of Durkheim's generalization, some later literature has taken their valuable study to be a "refutation" of Durkheim's theory (*e.g.,* Schur, 1967: 111-13).[1] The present comment attempts to analyze the reasons justifying the diffidence expressed by Schwartz and Miller and to show that their findings do not result in a definitive invalidation of Durkheim's thesis.

Schwartz and Miller, availing themselves of the existing ethnographical materials, scale 51 sample societies on three characteristics: "counsel," "mediation," and "police." They define (1964: 161) these three terms as follows:

Counsel: regular use of specialized non-kin advocates in the settlement of disputes;

Mediation: regular use of non-kin third party intervention in dispute settlement;

Police: specialized armed force used partially or wholly for norm enforcement.

On the basis of a study of the selected materials, the authors (1964: 163) report the emergence of the following "scale types":

> [E]leven societies showed none of the three characteristics; eighteen had only mediation; eleven had only mediation and police; and seven had mediation, police and specialized counsel.

Schwartz and Miller conclude (1964: 166), first, that Durkheim's hypothesis that "penal law — the effort of the organized society to punish offences against itself — occurs in societies with the simplest division of labor" is "superficially at least . . . directly contradictory" to their findings. Their data show that the police are found only in association with

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"a substantial degree of division of labor." Eighteen out of twenty societies which had police also had the following characteristics: (1) "substantial degree of specialization"; (2) economic development permitting use of money; (3) "full-time governmental officials, not mere relatives of the chief."

Second, they find that

> restitutive sanctions — damages and mediation — which Durkheim believed to be associated with an increasing division of labor are found in many societies that lack even rudimentary specialization.

Third, in a long (and somewhat obscure) footnote the authors (1964: 166-67) acknowledge "a basic difficulty" in testing Durkheim's thesis. This difficulty does not arise so much from Durkheim's attempt to trace the relationship between "division of labour and the type of sanction" but from his (attributed) *addition* of a "criterion of organization." Schwartz and Miller feel that this organizational criterion was "very broad" for penal law, but "quite narrow" in describing the "kind of organization needed for non-penal law." Thus, Durkheim seemed to indicate "assembly of the whole people" as a sufficient form of organization for administration of penal law, but he seemed to specify increasingly "specialized" organs (*e.g.*, "consular tribunals, councils of arbitration, administrative tribunals of every sort") as necessary for restitutive law. In addition, restitutive law required "particular functionaries," such as magistrates and lawyers, for its implementation. Schwartz and Miller conclude:

> In thus suggesting that restitutive law exists only with highly complex organizational forms, Durkheim virtually insured that his thesis would be proven — that restitutive law would be found only in complex society.

I shall analyse each of these three criticisms separately, and in the process restate the Durkheimian hypothesis as I understand it.

II. PENAL LAW AND "POLICE"

Illuminating and impressive as the empirical data are, their interpretation and organization appear somewhat vitiated by the implicit assumption that penal law and repressive sanctions require such specialized non-kin norm-enforcing agency as police. To be sure, a police force is one way in which society can organize its effort "to punish offences against itself." But it is not the *only* (and some may argue, perhaps not the most effective or morally superior) way.

It appears, first, that refutational magic is performed by the stipulative definition of "police" with which Schwartz and Miller operate. "Police" signifies to them a "specialized armed force used partially or wholly for norm enforcement." By so defining "police," Schwartz and Miller *themselves* virtually insure that their counter-thesis is correct! Certainly, *some* kind of machinery for "norm enforcement" is basic to any characterization of society involving use of legal sanctions — regardless of the type of such sanctions. Based on the evidence, however, in "simpler" societies founded on mechanical "solidarity" and characterized by a rudimentary division of labor, one can scarcely expect this type of specialized "police."

It is a valid scientific demand that a theoretical sociologist envisaging a social system characterized by pre-eminence of either repressive or restitutive sanctions, also be able to conceptualize the social structures necessary for the organization and implementation of such norms. This demand is equally valid when made on an empirical sociologist examining an actual social system. The burden of scientific proof in either case can be sustained by postulating or proving (as the case may be) institutional complexes performing repressive or restitutive functions. This, however, does not mean that one is entitled to augment the burden of proof to the extent that the hypothetical or existent social systems exhibit a *specific* type of formal organization which we call "the police." Unfortunately, Schwartz and Miller make precisely this latter type of claim in relation to Durkheim's thesis.

Second, in simpler societies the relationship between repressive sanctions and the appropriate authorities or personnel is ambiguous. The ambiguity is aggravated when one uses the term "enforcement" to mean a specific type of coercive implementation of authoritative decision. But the term "enforcement" can be employed in a variety of senses. The use of a particular meaning of the term should be guided, above all, by its appropriateness to the context and by its heuristic fruitfulness. There appears to be no compelling reason why the term "enforcement" should not mean, simply, the creation, invocation and application of norms in decision-making (whatever specific form the latter may take). A norm may thus be enforced even if there has been no formal execution of decision or judgment. "Tribal" law or law of the "simpler societies" does not necessarily need a specialized agency of enforcement to supplement an adjudicatory institution. It is, of course, in this sense that

international law is "enforced" in the judgments of the International Court of Justice, notwithstanding the lack of appropriate machinery or personnel specialized in the task of enforcement.

Third, in some social systems authoritative decision-making may, without more, just as effectively constitute "enforcement" as coercive implementation by specialized personnel.[2] In the international social and political system, this is of course an ideal, rather than a reality. But in some social systems it may be a reality. Norm-enforcement within a family (a social system) for example does not normally display (nor require, nor render wholly possible) anything more than authoritative articulation of norms by the parental authority or the "head" of the family. So, perhaps, in "tribal" societies. So also, perhaps, in "simpler societies" characterized by rudimentary division of labor.

This leads to an allied, and more crucial, observation. The functions of authoritative decision-making and coercive implementation of such decisions may in some social systems, as in "tribal" societies, reside in a particular status. The fact that a decision is made carries with it the possibility, not only of spontaneous compliance but also of coercive implementation by the incumbent of a social position or others to whom he delegates decision-making power. There is no a priori reason for saying either that these two roles cannot be combined in one social position or that delegation of coercive implementation requires a specialized social structure. Even if the latter were so, there is no compelling reason why such structures need have non-kin, rather than kin elements.

III. RESTITUTIVE SANCTIONS IN "SIMPLER SOCIETIES"

The second "refutation" of Durkheim is that "restitutive sanctions" which he "believed to be associated with an increasing division of labor are found in many societies that lack even rudimentary specialization." It is indeed true that restitutive sanctions are to be found in "simpler societies." But one cannot attribute to Durkheim the view that restitutive sanctions were *not* to be found in "many societies which lack even rudimentary specialization." True, there are overstatements and generalizations in chapters two, three and four of *The Division of Labor in Society* which create the impression that Durkheim, indeed, held the view that our authors impute to him. But a careful reading of Durkheim yields a thoroughly opposed con-

clusion. We find that Durkheim is as clear as any writer could be on the point. His thesis is that "restitutive law . . . *holds a very minor position*" (emphasis added) in societies with rudimentary division of labor. Durkheim nowhere states or implies that restitutive sanctions are altogether *absent* from such societies. In fact, chapter four of his classic work (1933: 133) states his hypothesis most clearly at the outset:

> [I]f the two types of solidarity we have just distinguished really have the juridical expression that we have suggested, the *preponderance* of repressive law over cooperative law ought to be just as great as the collective type is more pronounced and as the division of labor is more rudimentary. Inversely, commensurate with the develcpment of individual types and the specialization of tasks, the *proportion* between the two types of law ought to become reversed. The reality of this relationship can be shown experimentally (emphasis added).

I believe that, instead of "refuting" Durkheim on this point, the Schwartz-Miller study has merely demonstrated the "reality" of the relationship hypothesized by Durkheim. Durkheim does not formulate "repressive" or "restitutive" sanctions as mutually exclusive, ideal types of social structures. Rather, he speaks in relative terms — of "proportions" and "preponderances."

IV. ORGANIZATION OF SANCTIONS

Schwartz and Miller's (1964: 166, fn. 30) third principal criticism focused on the following observations of Durkheim (1933: 113):

> [W]hile repressive law tends to remain diffuse within society, restitutive law creates organs which are far more specialized consular tribunals, councils of arbitration, administrative tribunals of every sort. Even in the most general part, that which pertains to civil law, it is exercised only through particular functionaries; magistrates, lawyers, etc., who have become apt in this role because of very special training.

Schwartz and Miller have great difficulty with this part of Durkheim's exposition. They say he introduces, in addition to the two types of sanctions, "the criterion of organization" of penal and non-penal law. This additional criterion, they suggest, is applied inconsistently. Durkheim, they assert, applies a very broad definition of "organization" to penal law, a quite narrow one to non-penal law. That is, for penal law the "whole assembly of people" was sufficient organization. But for non-penal law Durkheim insists on the presence of specific institutional mechanisms. This inconsistency, Schwartz and Miller assert, results in a scientifically impermissible self-validation of hypothesis. As they say (1964: 166, fn. 30):

> In thus suggesting that restitutive law exists only with highly complex organizational forms, Durkheim virtually insured that his thesis would be proven — that restitutive law would be found only in complex societies.

Taking this last point first, I must reiterate that it does not seem to be Durkheim's view that "restitutive law would be found only in complex societies." As the preceding discussion demonstrates, it is clear that Durkheim was merely positing the relative eminence of repressive law in "simple" societies and of restitutive law in societies with high division of labor.

The Schwartz-Miller criticism must then be reformulated to suggest that the criterion of organization employed by Durkheim is impermissibly self-fulfilling even in regard to the relative eminence hypothesis. To sustain this criticism, one would have to show that: (a) as regards enclaves of restitutive law in societies with mechanical solidarity, Durkheim failed to specify any appropriate organization of restitutive sanctions; (b) as regards enclaves of repressive law in societies possessing organic solidarity, Durkheim failed to specify appropriate organization of penal sanctions.

This last (b) is clearly not true. It is, however, true that Durkheim failed to specify, except very broadly, structures for the enforcement of "restitutive" sanctions in "simpler" societies with predominantly repressive law. But it is plausible to argue, with Durkheim, that the manner in which sanctions are organized depends upon the dominant type of sanction. The latter is, in turn, closely related to the social structure and the type of cohesion it manifests. This *renvoi* of law to social structure and *vice versa* is neither self-evidently nor necessarily question begging.

Moreover, Durkheim's contentious passage quoted above occurs in the midst of a discussion of the nature of the restitutive sanction. The quoted passage is immediately preceded by the following observations (1933: 112-13):

> [R]epressive law corresponds to the heart, the centre of the common conscience; laws purely moral are a part less central; finally, restitutive law is born in the ex-centric regions whence it spreads further. The more it becomes truly itself, the more removed it is.

It is in this context that Durkheim arrives at the contentious passage. The "ex-centric" character of restitutive law, its further spread entailing remoteness from and progressive dilution of the common conscience, is made "manifest by the manner of the

functioning." Read carefully, Durkheim is not introducing any criterion of "organization of sanctions" here at all. He is merely reinforcing the characteristics of repressive law by an illustration of the manner in which it functions. Durkheim's concern, in other words, is not at all with *how* the sanctions are organized but with *why* they are organized.

V. CONCLUSION

The Schwartz-Miller study is a landmark in the literature on legal evolution. But their study advances the proper appreciation of Durkheim only by proffering a controversial interpretation of his thesis rather than by its refutation.

NOTES

[1] Readers in legal sociology present the Schwartz-Miller article without questioning the "invalidation" of Durkheim's hypothesis (Friedman and Macaulay, 1969: 986-88). Subsequent communication on the Schwartz-Miller article seems to have accepted their criticism of Durkheim (Udy, 1965: 625-27; Wimberley, 1973: 78-83).

[2] Even in modern, complex, economically-organized societies, enforcement (in the narrow sense of occupational specialists employing public coercion within a rule-structure) is merely one aspect of the legal system as an instrument of social control (*e.g.*, Hart, 1961). Enforcement in a broader sense (as used in the text to mean induced "habits" of compliance together with informal sanctions) must co-exist with enforcement in a narrow sense if a legal system is to be a viable mechanism of social control.

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