DURKHEIM ON LEGAL DEVELOPMENT AND SOCIAL SOLIDARITY

Michael Clarke's note[1] on Durkheim is timely and interesting because, as he remarks, Durkheim's analysis of law is an aspect of his writings which has received insufficient attention. Clarke usefully indicates a number of aspects of Durkheim's view of law which suggest fruitful lines of development for contemporary research in the sociology of law. My purpose in this further comment is to indicate a somewhat different perspective on the significance of Durkheim's writings on law and legal concepts and to take issue with some of Clarke's interpretations of Durkheim and of some empirical evidence which he regards as relevant to Durkheim's theses. In doing so I want to draw attention to certain problems involved in using Durkheim's theory of legal development which are glossed over in Clarke's note and, at the same time, to indicate defences which can be raised on Durkheim's behalf against some of the criticisms of his ideas to which Clarke refers. Specifically, this note seeks to clarify, in the light of statements in Clarke's paper, two matters which are fundamental to Durkheim's writings on law; firstly, the relationship of law with morality and *conscience collective* particularly in societies having a highly developed division of labour and, secondly, the meaning which Durkheim attaches to the terms restitutive (co-operative) law and repressive (penal) law and the significance of his definitions of these terms for attempts to test, by means of empirical evidence, his thesis concerning legal development.

Law, conscience collective and organic solidarity

Clarke remarks that for Durkheim law was the expression of the *conscience collective,* that Durkheim "insistently identifies" law with the *conscience collective,*[2] that is, with the "totality of beliefs and sentiments common to average citizens of the same society."[3] It is hard to know what to make of these statements since they are not adequately explained but, however they are taken, they seem misleading and over-simplified. Even where law is, for Durkheim, an expression of the *conscience collective* it is not necessarily the only such expression nor the most important and Durkheim does not see the major part of the law in complex industrial societies as an expression of the *conscience collective.* Also, if by saying Durkheim "identifies" law with the *conscience collective* Clarke means that there is an identity between the content of the law and the content of the *conscience collective,* this is not true for any society which Durkheim considers. Penal law, for Durkheim, certainly expresses the *conscience*

[1] "Durkheim's Sociology of Law" (1976)3 *British J. of Law and Society* 246.

[2] *Ibid.*, pp. 246, 253.

[3] E. Durkheim, *The Division of Labour in Society* transl. G. Simpson (1964 Free Press, New York)79. There are various interpretations of the exact meaning (or meanings) of the term in relation to Durkheim's writings as a whole but the definition cited is the one he relies on in setting out his conception of law in *The Division of Labour in Society.*

collective in both simple pre-industrial societies characterized by mechanical solidarity and complex societies characterized by organic solidarity deriving from the conditions of the division of labour. But, significantly, the character of the *conscience collective* is seen as changing fundamentally where development from the one type of solidarity to the other occurs. Whereas in the archetypal simple society of mechanical solidarity the *conscience collective* is all-embracing and furnishes a comprehensive moral code expressed in and supported by penal law and repressive sanctions, in societies having a developed division of labour it tends to restrict itself, in so far as it remains strong and specific rather than diffuse, to the moral affirmation of the principle of respect for the human dignity of the individual. Accordingly, at least in Durkheim's analysis in *The Division of Labour in Society,* it ceases to be a major component of the social bond because it comes to express a predominantly *individual* ethos. Thus, penal law based on it and expressing it is to be seen not as directly expressing and fulfilling the mechanisms of social solidarity but, primarily, as providing a basis of moral order upon which the organic solidarity deriving from the division of labour can exist and flourish. The latter form of solidarity which becomes predominant in complex industrial societies is not the expression of a *conscience collective* since it arises from diversity, not uniformity, of individuals and groups; and the form of law—co-operative law accompanied by restitutive sanctions—which arises to reflect and fulfil it is similarly not based in any *conscience collective.* But co-operative law becomes the dominant form of law in complex industrial societies characterized by a highly developed division of labour. Restitutive law, Durkheim points out, reflects relations of a totally different character from those which penal law reflects. Whereas penal law is characterized by sanctions which make demands on the offender's fortune, honour, life or liberty and deprive him of something he enjoys, the sanctions of restitutive law involve only the return of things as they were, the re-establishment of troubled relations to their normal state. In the legal systems of complex industrial societies restitutive law includes contract law, domestic law, commercial law, procedural law, administrative and constitutional law—minus the penal rules therein. The relations associated with restitutive law "express a positive union, a co-operation which derives, in essentials, from the division of labour."[4] Hence the type of law which typifies complex industrial societies has little direct connection with any *conscience collective.* In general, its "prescriptions do not correspond to any sentiment in us, and as we generally do not scientifically know the reasons for their existence...they have no roots in the majority of us."[5] Durkheim notes that there are exceptions. Contracts affected by fraud or undue influence are repugnant not only to contract law but to quite general moral sentiments. "The different domains of the moral life are not radically separated one from another."[5] But, in general, "Repressive law

[4] *Ibid.*, p. 122.

[5] *Ibid.*, p.112.

corresponds to the heart, the centre of the common conscience; laws purely moral are a part less central; finally, restitutive law is born in very ex-centric regions whence it spreads further. The more it becomes truly itself, the more removed it is."[6]

This very fundamental aspect of Durkheim's analysis of law requires emphasis not only because of the great significance which he attaches to restitutive law in complex industrial societies, but also because his conception of restitutive law is closely connected with his conception of the character and problems of the State in such societies. Because penal law is a direct expression of the *conscience collective* it is close to the people. Its dictates correspond to shared beliefs. Consequently the State in enacting and enforcing penal law can, in general, be understood as expressing the *conscience collective* which is reflected directly in the individual conscience. In this sense the State is not remote from the individual or the group. But the position is different with restitutive law. Restitutive law grows out of and fulfils the conditions of the division of labour. It reflects not shared beliefs but a distinct form of social organization. Its basis is in social facts which have no necessary direct and obvious connection with individual states of mind. Thus restitutive law enacted by the State or its organs often does not "correspond to any sentiment in us" and at the level of individual awareness the reasons for the rules may not be understood.

Since restitutive law grows out of conditions of diversity within society, the establishment of rules to govern the relations of numerous functionally differentiated groups and units within society (different industries and professions) ought to reflect accurately the specific conditions of the different kinds of relationships and the different kinds of groups and units. But general rules established by the State may appear remote from the varied conditions of the division of labour. They do not reflect shared beliefs and sentiments which unite the whole society and the State is too distant from the complex interrelations arising through ever increasing division of labour to legislate with sufficient precision and subtlety to reflect the variety of conditions while yet laying down general rules of wide applicability.

Durkheim's answer to this problem is a kind of national organization which involves the establishment of semi-autonomous corporations in a system something like that of the old craft guilds.

> Let us imagine—spread over the whole country—the various industries grouped in separate categories based on similarity and natural affinity. An administrative council, a kind of miniature parliament, nominated by election, would preside over each group. We go on to imagine this council or parliament as having the power, on a scale to be fixed, to regulate whatever concerns the business: relations of employers and employed—conditions of labour—wages and salaries—relations of competitors one with another, and so on.... The establishment of this central organ appointed for the management of the group in general, would in no way exclude the forming of subsidiary

[6] *Ibid.*, pp. 112-113.

> and regional organs under its direction and subordinate to it. The general rules to be laid down by it might be made specific and adapted to apply to various parts of the area by industrial boards.... In this way, economic life would be organized, regulated and defined, without losing any of its diversity.[7]

Durkheim develops these ideas at several places in his writings but particularly in the lectures translated as *Professional Ethics and Civic Morals.* He sees the State extending its functions greatly with the increasing complexity of the division of labour. Its administrative tasks become more extensive and complex in regulating the interplay of diverse functions. The growth of restitutive law and the predominance of restitutive sanctions reflect this development. The semi-autonomous legislative activity of the corporations is a way of bridging the gap separating the State's regulative capabilities from the actual moral conditions of organic solidarity.

These aspects of Durkheim's political theory are important to an understanding of his conception of law because they indicate that the relationship of law, morality and *conscience collective* in his writings is more complex than Clarke seems to suggest. While the *conscience collective* signifies something relatively specific in conditions of mechanical solidarity, it becomes an extremely vague and impenetrable notion with regard to the conditions of organic solidarity. Thus, when Durkheim is thinking primarily of the strong *conscience collective* of societies whose solidarity is mechanical he can write that governmental power is "an emanation of the inherent life of the collective conscience."[8] But elsewhere he notes that:

> It is not accurate to say that the State embodies the collective consciousness, for that goes beyond the State at every point. In the main, that consciousness is diffused: there is at all times a vast number of social sentiments and social states of mind of all kinds, of which the State hears only a faint echo. The State is the centre only of a particular kind of consciousness, of one that is limited but higher, clearer and with a more vivid sense of itself.... we can therefore say that the State is a special organ whose responsibility it is to work out certain representations which hold good for the collectivity. These representations are distinguished from the other collective representations by their higher degree of consciousness and reflection.[9]

It is these representations—which Durkheim sometimes refers to in terms of a "government consciousness"—which are reflected in the law making activities of the modern State.

The close link between law and morality, however, remains fundamental for Durkheim's conception of law. Law and morality are of fundamentally the same nature. They are differentiated only in the administration of their sanctions—diffuse for morality, organized for law. Thus, the conditions of the division of labour require a moral regulation to perfect organic solidarity. In societies of mechanical solidarity, law, morality and religion

[7] E. Durkheim, *Professional Ethics and Civic Morals* transl. C. Brookfield (1957 Routledge and Kegan Paul, London)37.

[8] *Division of Labour in Society*, *op.cit.*, p. 195.

[9] *Professional Ethics and Civic Morals*, *op.cit.*, p. 50.

are typically closely interwoven. They are merely expressions of the *conscience collective.* But, in complex industrial societies, where is restitutive law to find its supporting morality? Durkheim's answer is that where "restitutive law is highly developed, there is an occupational morality for each profession. In the interior of the same group of workers, there exists an opinion, diffuse in the entire extent of this circumscribed aggregate, which, without being furnished with legal sanctions, is rendered obedience."[10] Thus, the morality which corresponds to restitutive law is localized rather than general throughout the society. Here we return again to Durkheim's system of semi-autonomous corporations. In order to make law and morality as closely harmonious as possible so that they support each other to the fullest extent in complex industrial societies, the power to legislate in matters of detail should be located at the level of the occupational group where an "occupational ethics" can be fostered and infused into the provisions of law. Durkheim notes: "[i]f morality is allowed to penetrate into law, it invades it; and if it does not penetrate, it remains as a sort of dead letter, as a pure abstraction, instead of being an effective discipline of wills."[11]

Durkheim's conception of law in modern industrial society thus involves as its central problem that of maintaining the mutual support of law and morality in a situation in which a clear shared morality uniting the whole society and expressing the *conscience collective* no longer provides an adequate basis for the law as a whole. If Durkheim's answers to the problem no longer seem satisfactory, the questions he asks and the theoretical framework in which they are located remain of interest. The image of law which he projects is not simply an image of law as a reflection of shared values. Law is the creation of the State. It may diverge from the values of the community or of groups within it. Much of its content strikes no responsive chord in sentiments of individuals. Yet restitutive law grows out of the conditions of organic solidarity and it needs the support of moral values, though not necessarily universally shared beliefs. Law thus exists in a complex relationship with State power, systems of values and social conditions. Durkheim's analysis of the role of the State and the relationship of law and political power is, for many reasons, inadequate.[12] But his view of the social dimensions of legal regulation is sufficiently sophisticated to warrant further analysis and development. In particular, Durkheim's analysis seems to point towards a view of the legal order as a relatively distinct structural level within society, although plainly one which has intimate links with political, economic and other structures.

[10] *Division of Labour in Society*, *op.cit.*, p. 227.

[11] *Ibid.*, p. 427.

[12] See e.g. M. Richter, "Durkheim's Politics and Political Theory" in *Essays on Sociology and Philosophy by Emile Durkheim et al,* (ed. K.H. Wolff, 1964 Harper and Row, New York).

Clarke refers to two well known pieces of empirical research[13] and uses them as evidence to suggest flaws in Durkheim's theory of legal development. In so doing he ignores some fundamental problems concerning the manner in which Durkheim's thesis on legal development is presented and the way in which the key concepts on which it depends are constructed.

One of the studies, by Schwartz and Miller, which seeks to show a pattern of legal evolution through a cross-cultural study of 51 societies, is often cited in this connection despite the fact that the authors themselves were extremely cautious in suggesting that their findings might cast some doubt on Durkheim's theory. As Baxi[14] has argued, they were justified in their caution, although it is not emulated by other writers, including Clarke, who associate Schwartz and Miller's study with an at least partial refutation of Durkheim.

Apart from the fact that it is extremely difficult to develop specific hypotheses from cross-cultural data of the type Schwartz and Miller present, the crucial point is that the concepts which underpin their study are not the same as those around which Durkheim's analysis of legal development is constructed, and the two sets of concepts are not directly comparable. Clarke writes that Schwartz and Miller's findings do appear to demonstrate "that penal sanctions are not characteristic of the simplest societies but that a restitutive legal process is."[15] But if we take carefully the meaning which Durkheim attaches to the relevant concepts, restitutive (co-operative) law and repressive (penal) law, Schwartz and Miller's findings do not demonstrate what Clarke suggests.

In relating their findings to Durkheim's thesis one problem which Schwartz and Miller rightly stress is that Durkheim specifies different organizational requirements for the operation of repressive law and restitutive law. For repressive law these can be minimal. The distinctive organization of penal law does not require formal regulation of punishment nor the institution of criminal procedure. It requires only the existence of a tribunal to judge the offender and express the collective reaction against his crime. The tribunal may consist of the whole people or any part of them. The only important matter is that the collective reaction has a definite organ as intermediary. It becomes organized rather than diffuse.[16] But, in contrast to penal law, "restitutive law creates organs which are more and

[13] Schwartz and Miller, "Legal Evolution and Societal Complexity" (1964)70 *Am. J. Sociology* 159; Schwartz, "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements" (1954)63 *Yale Law J.* 471.

[14] See Baxi, "Comment—Durkheim and Legal Evolution: Some Problems of Disproof" (1974)8 *Law and Society Rev.* 645; and Schwartz's reply, *ibid.*, p. 653.

[15] Clarke, *op.cit.* p. 254.

[16] *Division of Labour in Society*, *op.cit.*, p. 96.

more specialized: consular tribunals, councils of arbitration, administrative tribunals of every sort. Even in its most general part, that which pertains to civil law, it is exercised only through particular functionaries: magistrates, lawyers, and so on, who have become apt in this role because of very special training."[17] As Durkheim makes abundantly clear, restitutive law is not simply mediation of private interests. It is "a social thing and has a totally different object than the interests of the pleaders."[17] It is significant for Durkheim not because it suggests anything about the character of modes of conciliation and redress at the level of individual disputes, but because it shows the establishment in authoritative legal codes (which are themselves indices of the morality which reflects and is necessary to fulfil the requirements of social solidarity) of rules which recognize the individual consciousness as something not wholly subsumed within the collective consciousness. The existence of such rules as a significant part of the legal structure shows that the society is such that the moral-legal regulation on which social solidarity depends must take account of social relationships based on differences and not merely on likenesses.

Now let us turn to Schwartz and Miller's concepts. They are "mediation", "police" and "counsel". Using Schwartz and Miller's definitions, "mediation" is considered to be present in a society where there is "regular use of non-kin third party intervention in dispute settlement." "Counsel" are held to exist where there is a "regular use of specialized non-kin advocates in the settlement of disputes." "Police" refers to a "specialized armed force used partially or wholly for norm enforcement."[18] Schwartz and Miller's study of 51 societies provided striking evidence that when specialized counsel exist in a society, mediation and police will also exist. Where a society has police it almost invariably also has mediation but may not have counsel. Finally, mediation may exist without the presence of police or counsel. Thus an evolutionary development parallelling the growth of societal complexity and involving the successive appearance of mediation, police and counsel, is suggested by the data. It is further suggested that this evidence casts doubt on Durkheim's thesis of a movement from the preponderance of repressive law to that of restitutive law with increasing societal complexity.

We have already seen that restitutive law in Durkheim's sense does not mean simply the mediation of disputes. Restitutive law is of interest for him because it is the relatively visible index of *moral* phenomena general throughout the society and dependent on the recognition of differences in the interests and sentiments of individuals. He chooses *law* as his index of social solidarity; not damages, punishment or dispute resolution. The character of sanctions is important but, in this context, only because the differing kinds of sanctions attached to the law enable it to be categorized in a manner useful for Durkheim's thesis about the nature of social solidarity.

[17] *Ibid.*, p. 113.

[18] Schwartz and Miller, *op.cit.*, p.161.

Neither is observed custom the index of solidarity. "If, then, there are types of social solidarity which custom alone manifests, they are assuredly secondary; law produces those which are essential and they are the only ones we need to know."[19] Law is important for him because it indicates in observable form a morality operative at the level of the whole society and sufficiently central to the society's existence to be reflected in definite, communicable, codified rules. For Durkheim the *substantive* content of legal rules (and the moral ideas they reflect) is far more important, given the purposes of his inquiry, than *procedures* of dispute resolution or enforcement of norms. The latter are merely peripheral. No doubt mediation may arise for many reasons of expediency and establish itself in custom without there being any significant amount of restitutive law in Durkheim's sense.

Durkheim's insistence that his index of social solidarity is *law* clearly raises problems of the definition of law which are unending and often tedious when the character of law in simple societies is under discussion. He avoids this problem by drawing his evidence largely from societies having codes of written laws where the identification of "the legal" does not pose insuperable problems. To judge his ideas on legal development as they appear in *The Division of Labour* it may be necessary to restrict discussion to cases of legal systems which have developed to the stage of possessing written laws, since it is primarily the evidence of written codes which he seeks to make use of in choosing law as his index of forms of solidarity.[20]

If Schwartz and Miller's concept of mediation is not directly comparable with that of restitutive law, neither is their concept of police directly related to Durkheim's concept of penal or repressive law. As Baxi argues, a police force is not the only means by which a society can organize effort to punish offences against itself. For Durkheim the all-important *legal* quality of penal law is given through procedures, rudimentary or complex, for *declaring* and *applying* the law—the existence of a tribunal whether of the whole population or a part of it—not through procedures for *enforcement.* Repressive sanctions may be inflicted in many ways but if they are imposed by the whole community, for example in a stoning of the offender, or by any person at random, for example, after a declaration making the offender an outlaw, they are legal if they follow from the application by a tribunal of established authoritative rules.[21] No doubt if we followed the suggestion made earlier and restricted our consideration to societies having written codes we should find a high correlation between the existence of penal law

[19] *Division of Labour in Society, op.cit.*, p. 66.

[20] *Cf.* Barnes, "Durkheim's Division of Labour in Society" (1966)1 (N.S.) *Man* 164, 168.

[21] See *Division of Labour in Society, op.cit.*, p. 427, where Durkheim gives other examples. Given Durkheim's position on this, it is doubtful whether the problem of comparability is solved by Schwartz's substitution of a concept of "punishment" (through government action) for the concept of "police" in an attempt to meet the specifications of Durkheim's "repressive law". See (1974)8 *Law and Society Rev.* 653.

and the existence of police. But such a correlation is not necessary in order to give meaning to Durkheim's conception of penal law.

Similar problems of comparability arise in relation to another empirical study[22] which Clarke cites as casting doubt on Durkheim's ideas. Schwartz studied the forms of social control operating in two Israeli kibbutzim each having a population of about 500 and being sufficiently isolated socially and in other respects from their surroundings to justify treatment of them as distinct societies. Schwartz's object was to study the relationship between legal and informal controls, legal controls being defined by him as those operated by specialized functionaries who have the task of intra-group control socially delegated to them. His object was thus not the same as that of Durkheim in *The Division of Labour* where the focus of interest is on the *content* of norms governing the societies. As we have seen, Durkheim is not particularly interested in terminological disputes about the meaning of "law". The distinction between legal and moral norms is of no great significance for him except that legal norms are, generally, easier to study directly since they are often in written form and represent the most precise and socially important moral ideas. Schwartz's findings were that, according to his definition of legal controls, the Moshav kibbutz showed reliance on such controls but the Kvutza kibbutz had not experienced the need to introduce legal controls and functioned successfully through the use of informal social controls. Schwartz concluded that the difference in the control mechanisms of the two kibbutzim was explicable in terms of the different principles of economic and social organization of the communities and the consequences which followed from the attempt to implement these principles. In the Kvutza, where life was thoroughly communal and egalitarian, collective opinion exercised powerful informal controls to prevent serious deviance from the strict norms of community life. In the Moshav, life was much less extensively collectivized; families lived in separate units, private property existed and farmers had considerable individual autonomy in deciding on policies and methods. None of these conditions existed in the Kvutza. Although Schwartz's article does not refer to Durkheim, there are, as Clarke points out, some obvious similarities between the character of the Kvutza community and the conditions of mechanical solidarity as Durkheim describes them.

Clarke's main point in relation to Schwartz's study seems to be that, accepting that the kibbutzim are "artificial" societies in several important respects, the study shows, nevertheless, that "penal sanctions, let alone harsh ones, were irrelevant to the case that most approximates Durkheim's mechanical solidarity (the Kvutza), precisely because of the nature of that solidarity."[23] The justification of this claim, and its possible relevance to Durkheim's thesis of legal development depends primarily on the meaning to be attached to "penal sanctions". Durkheim notes that a legal sanction is

[22] Schwartz, *op.cit.*, *supra* n. 13.

[23] Clarke, *op.cit.*, p. 252.

differentiated from a moral sanction not in its intrinsic character but in the way in which it is administered.[24] Hence the distinguishing mark of law is seen in the existence of a tribunal to apply the rules. The test of "the legal" is thus different from Schwartz's test and, since the Kvutza had a highly comprehensive system of (moral) rules governing all aspects of social life, and in difficult or particularly serious cases the General Assembly (or even the Children's Assembly) decided what was to be done and how the rules were to be applied, it might be suggested that the germ of "the legal" in Durkheim's sense existed even in the Kvutza.[25] But this is less important here than the question of whether the controls of the kibbutzim were aimed primarily at repression or restitution. Schwartz's study is not particularly clear on this; understandably so since it is not his major concern. But he does make clear the legal problems involving property relationships which arose in the Moshav and the need for detailed rules to solve them. Such rules, given the problems indicated, would be restitutive in Durkheim's sense. The informal sanctions reflecting the "mechanical solidarity" of the Kvutza appear to be primarily repressive. The object is to maintain conformity with the collective ideals and the strict norms of community living. There is no private property and, apparently, no basis for binding transactions between individuals of a kind which would require restitutive rules.

Schwartz's study is not intended to explain patterns of legal development. There is no indication of movement from Kvutza social organization towards Moshav organization. Hence nothing here is relevant, directly, to Durkheim's thesis of legal development from a preponderance of penal law to a preponderance of restitutive law. As related to Durkheim's ideas, the study merely indicates the ways in which forms of social control may differ as between societies which approximate, very roughly, conditions of mechanical and (to some extent) organic solidarity, other factors being equal. It shows the development of more sophisticated procedures of norm application and enforcement in conditions in which restitutive rules appear to be significant, and much less formal procedures in conditions in which repressive rules appear to be more dominant. None of this seems to be seriously inconsistent with Durkheim's views on the more extensive organizational requirements for restitutive as compared with repressive law. Beyond these generalisations, however, it is hard to make direct comparisons, with any confidence, between the kibbutz societies and Durkheim's societies of mechanical and organic solidarity. Too many variables, arising from the particular circumstances of existence of the kibbutzim as societies within a larger society, present themselves.

[24] *Division of Labour in Society*, *op.cit.*, p. 427.

[25] *Cf.* Shapiro, "Law in the Kibbutz: A Reappraisal" (1976)10 *Law and Society Rev.* 414, 423, referring to later research and to Schwartz's own apparent change of view in his later article, "Democracy and Collectivism in the Kibbutz" (1957)5 *Social Problems* 137.

My intention in the above discussion of empirical work is not primarily to defend Durkheim and his thesis concerning legal development[26] but to indicate some of the difficulties involved in using empirical evidence to test his ideas. Durkheim's classifications of law—restitutive and repressive—are formulated in the service of his thesis regarding the forms of social solidarity. As has often been stressed, Durkheim's method of presentation is to make it appear that his theories arise from empirical data whereas in fact the empirical evidence is organized judiciously to support the theories he wants to convey. I disagree with Clarke's view that this characteristic of Durkheim's writings "is of little importance in this context".[27] The classification of laws is significant only in the context of Durkheim's ideas on social solidarity. As a framework for understanding types of law *per se* it is grossly oversimplified and compares unfavourably with the sophisticated analyses to be found in the literature of legal theory. But in the light of the sociological theory which motivates Durkheim to select and organize material from specific legal systems in a particular way, the classification makes sense and is illuminating. Thus the meaning of "repressive law" and "restitutive law" in Durkheim's discussion must be understood in terms of the theoretical objectives which are served by his construction of these concepts. The same point needs to be made about his conception of "law" in general. The distinction between law and morals remains blurred in his analysis because it is a distinction of no great importance to him given that his primary interest in law is as an index of the existence of moral phenomena. This also explains why he makes little attempt to seriously delimit "the legal" in societies not possessing written laws. Written laws provide the visible index which justifies his interest in law, hence they are the focus of his concern.

There are many problems and oversimplifications in Durkheim's view of legal development and in his view of the relationship of forms of law and forms of social solidarity, but his work offers some valuable orientations for contemporary analysis of the character and functions of law and it suggests potentially fruitful approaches to the study of legal history and comparative law. In stressing the significance and complex character of non-penal law in complex industrialized societies he provides an important corrective for sociological perspectives on law, given the orientation of criminology and the tendency in some sociological writings to concentrate on penal law as necessarily the dominant type of law and to underemphasize the sociological interest of non-penal law. Furthermore, in concentrating attention on the substantive content of the law rather than on procedure and machinery of enforcement and adjudication, Durkheim points clearly to the sociological significance of the analysis of legal and moral concepts, some of which—for example, contract and property—are discussed in detail

[26] For a recent survey of evidence from legal history see Sheleff, "From Restitutive Law to Repressive Law" (1975)16 *Archiv. européenes de Sociologie* 16.

[27] Clarke, *op.cit.*, p.248.

in his own work and in that of some of his closest disciples. Whatever the uncertainties, ambiguities, limitations and omissions of Durkheim's approach to the analysis of law, his work remains an important guide and stimulus for the development of studies of the character of law as a social phenomenon.

ROGER B. M. COTTERRELL*

* Faculty of Law, Queen Mary College, University of London.

DECRIMINALISING CANNABIS

Most societies use some form of consciousness-altering drug either as a relaxant or for some other purpose. In Britain alcohol has been widely used for countless centuries, and tobacco since the sixteenth century. Both of these "legal, acceptable" drugs cause enormous social and physical damage. It has been estimated that there are at least a third of a million alcoholics in Britain[1] and that annually 50,000 people die prematurely due to tobacco smoking.[2] Most drugs can be abused and it is doubtful that any substance is completely safe, especially if used heavily. Regardless of its chemistry, any drug that produces a pleasant emotional state will attract some users whose psychological disturbance or social deprivation leads them to excessive use. In addition, some drugs may cause physical harm. Alcohol consumed heavily and regularly causes liver disease and a multiplicity of other physical ailments. Smoking tobacco causes lung cancer and other respiratory diseases. Even moderate tobacco use is harmful and some drugs like L.S.D. or solvents *may* produce serious psychological or physical harm, even after use on a single occasion. Nevertheless, the use of consciousness-altering drugs is virtually universal. It is possible that there is a basic human need for such drugs, or at least for an altered mental state.[3]

When the use of cannabis (marihuana, hashish, grass, dope, shit or pot) spread amongst young people in Britain during the 1950's and 1960's, there was concern that a drugs' epidemic similar to that in the United States was developing. Youthful non-medical drug use was then a new phenomenon and people often failed to distinguish between one form of drug use and another. This was partly due to lack of information about patterns of drug use and partly due to the concurrent increase in the numbers of young people dependent upon heroin and other injected drugs. Case histories of drug users in treatment or penal institutions revealed that many had used cannabis before becoming dependent on other drugs. It was inferred from

[1] N. Kessel and H. Walton, *Alcoholism* (1974 Pelican Books, Harmondsworth).

[2] M.A. Plant and E.B. Ritson, *Drugs and Young People in Scotland* (1977 Scottish Health Education Booklet, Edinburgh).

[3] A. Weil, *The Natural Mind* (1975 Penguin Books, Harmondsworth).