

A CRITICAL UNDERSTANDING OF DURKHEIM'S APPROACH TO LAW

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Abstract

Durkheim has a legal philosophical understanding of social dynamics on understanding of how law as penal and restitutive law as well as restorative justice operates in society. He vividly describes how the penal and restitutive law, criminal act and restorative justice functions in both simple as well as complex societies. The author in this paper explores Durkheim's approach and contribution to law and figures out the limitations of his understanding from Weberian perspective of understanding of law. Thus from the above background, the article would be three sections. The first section would have Durkheim's paradigm of social facts and the second would have explaining Durkheim as a legal theorist. The third section would have an understanding of limitations and criticism of Durkheim's law.

Key words: social fact, social solidarity, penal law, restitutive law, restorative justice.

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1. Introduction

It is the belief of Durkheim that human society, like science, follows laws that could be discovered using empirical evidence and testing. He proposed that the units of analysis “social facts’ could be analysed scientifically. These social facts were the coercive social and behavioural and bounded by psychological entity. With this approach, Durkheim adopted a functionalist perspective that social institutions and practices could be understood in terms of the functions they carry out in sustaining the larger social system and maintenance of social solidarity. In this context an attempt has been made to understand the notion of sociology of law that sits in Durkheim’s analysis of division of labour and in his analysis of rules of sociological method. At the same time some limitations has been explored.

I

2. Durkheim’s Paradigm of Social Facts (SFs)

He characterises SFs as a group of phenomena. It is constituted of actions, thoughts, and feelings of individuals. However it is external to the individual. He finds society as a collective whole, which operates collectively; in a more organic way with the help of collective conscience (CS). It acts as natural laws and it has a coercive force on the people. The coercive force promotes morality. In this sense SFs remains the core operative elements of CS. Therefore change in the nature of SFs causes the change in the nature of CS also. Thereby, leading to the changes in societies: from simple to complex societies. According to Durkheim changes happens collectively with moral underpinning and ‘What constitutes social fact are the beliefs, tendencies and practices of the group taken collectively’¹. Hence, as a moral collectivist, he claims that it is the society which pursued its own interests, and morality is the attribution of society and not of the individual.

II

3. Analysing Durkheim as Legal Theorist and Weber’s criticism to it

In Durkheimian view, law has specificities of cultural expression. The specificities of being dressed up with the cultural aspects. In other words, whether it is in the simple societies or

¹. Durkheim, Emile. (1982). *The Rule of Sociological Method*, Translated by W.D. Halls, New York: Free Press, .pp. 54.

complex societies' one could find the legal specification of cultural values. This gets reflected in a synthetic way and hence it is termed as the synthetic expression of cultural values. To Durkheim this synthetic expression of cultural values contributes to social solidarity. Perhaps, on this basis of cultural contribution to social solidarity the nature of law is found differently in different societies. He emphasises on two different kinds of solidarities.

One is mechanical solidarities and the other is organic solidarity. The former kind of solidarities is found in those kind of societies which are simple societies e.g. tribal societies (where the exercise of legal mechanism is dependent on legal sanction which very often reinforces the traditional cultural values) and the later one found in those societies which are complex societies (where the demonstration of legal mechanism is based on restitutive sanctions that is restoring the previous situation).

From the above explanation one can infer that Durkheim analysis of law takes place in two different contexts. In one context criminal law becomes the basis to characterise simple societies. In another context he uses civil law to understand complex societies. In simple societies, criminal law defines and heightens community boundaries; and in complex societies, the civil law resolved the normative strains created by the division of labour (Cartwright and Schwartz, 1973: 341). Durkheim might have taken criminal law to understand simple societies and not civil law because it is the societies where individualism is not that much developed, the division of labour in that prevailing societies is less divided (due to the nature of mutual co-operation) and social links are not that much delinked due to the considerable homogenous demographic structure and hence unlike complex societies, simple societies does not require regulative mechanism and multiple exchange of transactions.

The complex societies being aligned with the very nature complex form of division of labour, it requires participation for self sufficiency and the survival of it requires the occurrences of the multiple transactions. This form of transactions requires continuous interaction of goods and information. It leads to the uncertainty of conflict and coordination and this lead to the analysis of contract law of Durkheim.

a. Durkheim and contract law

To Durkheim contract law has juridical consequences of regulating the consequences of our acts and this regulation is imposed on us and is the handiwork of society and tradition. For Cartwright and Schwartz definition contract law is;

“... the prototype of a modern legal institution, would be widely invoked in urban areas to expedite transactions by informing the parties of their potential reciprocities, reassuring them of their transactional partner's depend-ability, and providing moral if not legal sanction for performing normatively approved exchange”.²

However, the Weberian analysis of legal theories questions the very foundations of Durkheimian sense of legal theories of cultural values being unconcerned with the historical reasons and all norms reflecting the same decision making technology. Weberian model of legal theories concerned with the nature of legal authority, its being dependant to several factors and contextually embedded. He questions that whether legal decisions can be adequately explained by cultural value and societal differentiation. To him changes do happen. Function of the social organisation changes. At the end it influences the interpretation of legal norms and hence the normative specifications of an organisation also differs, thus Weber put thrusts on the development and construction of law as dependant to the values and interests of particular legal functionaries rather putting thrust on conscience collective. Weber is very much sceptical about the idealised public utility and absence of competition in Durkheim's model.

To Weber there are groups. They might use legal norms for their own gains. Today's norms of transaction are not free from such adversaries. Provided that there are inevitable conflicts, he felt that legal norms can often be placed at a competitive disadvantage. Lawyers having a professional interest may monopolise legal profession and it can severely constrains the distribution of legal pronouncement (Weber, 1968).

².Cartwright B.C and Schwartz R.D, (1973) *The Invocation of Legal Norms: An Empirical Investigation of Durkheim and Weber*. American Sociological Review, Vol. 38, No. 3, pp. 341.

b. Constraints of Applying Penal Law to Simple as well Complex Societies

For Durkheim, law is the expression of the conscience collective that law of a society is studied in its entirety, the being of it, as a part of whole and not as segmented parts. Law is studied as an expressive form of society's morality. It is studied with the totality of beliefs and sentiment (Lukes and Scull.1983) to which Clark identifies law with conscience collective (Cotterrell.1977).

Again penal law, for Durkheim, certainly expresses the conscience collective in both simple pre-industrial societies characterised by mechanical solidarity and complex societies characterised by organic solidarity. However the character of the conscience collective can be dependent on the changing and transitional nature of society from mechanical solidarity to organic solidarity. Durkheim talks about conscience collective as an all-embracing moral phenomenon. But in complex societies where we found strong individual ethos and individualistic nature of the moral bond that Durkheim speaks about cannot be applied. Subsequently, he maintains that in complex societies the basis of organic solidarity is moral order of social solidarity and hence penal law also cannot invoked. Again one could be sceptical about the conscience collective in complex societies on how it could be collective? Since, solidarity in the above mentioned kind of society derives from various groups which means it arises from diversity than from uniformity.

c. Comparative analysis of Restitutive law and Penal laws

In a simple notion of thinking it is the simple societies where punishment in a strict sense is applied rigorously. The aim of which is to prevent and forbid something from happening. Particularly it has a negative injunction. However Durkheim rejects the punishment which has emotional and the result of vengeance and the function of punishment are to give effect to the emotional outrage. Thus, in Durkheimian analysis one can notice the shift from repressive law to restitutive law.

d. Criminal Act as part of Penal Law

According to Durkheim criminal act falls under the category of penal law. It does not happen within moral domain of social groups. It shocks the social conscience. It goes against the collective conscience. It goes against the morality. Therefore it is an act of immorality (Lukes

and Scull, 1983:47-48) and hence it is followed by punishment. Punishment is exercised in penal laws as a part of shared values.

e. Restorative justice as part of restitutive law

Restorative justice focuses on the injuries. It involves direct compensation to the victims. Direct compensation in restitutive law found in the form of community services and apologies to the victim. It involves sanctions damages are restored. It is the state of returning to the normal state of condition (Cotterrell, 1977).

“Thus legal rules must be divided into two main species, according to whether they relate to repressive, organised sanctions, or to ones that are purely restitutory. The first group covers all penal law; the second, civil law, commercial law, procedural law, administrative and constitutional law, when any penal rules which may be attached to them have been removed.”³

III

4. Criticisms

Durkheim has provided influential ideas of positivism, solidarity, and social facts. It has encouraged ethnographers after him to further develop their theories and practices. It has paved the way for the institutionalisation of the fields of sociology and anthropology. However his ideas of sociology of law have received several criticisms like are penal sanctions predominant and harsh in earlier societies because of their mainly mechanical solidarity and only so in later ones because of centralised authoritarianism?⁴ Can the same question be stretched to the developing countries like India, which is neither authoritarian nor a simple society? The possible answer can be no because in India we can find subtle presence of both restitutive laws as well as penal laws (which are often very rigid and draconian). To be agree with Durkheim one could reiterate that law has a shared resource; it is communal rather than individual. However in case of the society like India where legal pluralism exist, law now could be studied as a diversity of

³.Durkheim, Emile, (1983) *The Division of Labour in Society*, Translated by W. D. Halls, New York: Free Press, [1893] 1984.pp 29.

⁴Clark,Michael (1976):*Durkheim's Sociology of Law* work(s):Source: British Journal of Law and Society, Vol. 3, No. 2 ,Winter,pp.254

regulatory strategies and forms, evolving from many different social sources in and beyond the nation state.

Second, Schwartz readings of Prof. Baxi criticisms to Durkheim raises the following question: ‘if there are to be coercive specialists, must they be distinct, as police are, from those who adjudicate norm violations?’⁵. In this context, with reading of restitutive law one ponders what are the regulative mechanisms? And if it is the police, then repressive sanction gets exercise by police only and not out of collective conscience of society. Even in simple society one can find private mechanism of redressing disputes and punishments and these societies often possess the mechanism of the means to do with restitutive measures. Thus from the above analysis one can infer that there is myth of primitive homogeneity and universality of law.

Conclusion

Durkheim observation on law is based on the idea that collective conscience acts as natural law having coercive force. Social facts are the soul of it and when social facts changes collective conscience also changes thereby leading to changes in the natural laws as well. He understands that legal expression is found in cultural values in a synthetic expressed form and it contributes to social solidarity both in simple as well as complex societies. Thus the basis of evolution of laws for Durkheim is found in two form of solidarity one is mechanical solidarity in tribal security where criminal law operates with legal sanctions and another is organic solidarity which is found in complex societies where law operates in restitutive manner. In the above process of evolution of law, however, Weber identifies certain limitations. Unlike Durkheim who puts much thrust on conscience collective for the development of law Weber rely on values and interest of particular legal functionary and authorities. Durkheim considers collective conscience as the whole moral source of laws which is necessary not possible in all cases. Thus though there are uncertainties, and limitation of Durkheim’s approach to the analysis of law, his work remains an important guide to understand law as a social phenomenon. His analysis and approach remains a theoretical optimism to understand societal relations and connections within the prism of law.

⁵ Schwartz, Richard D.(1974), *Legal Evolution and the Durkheim Hypothesis: A Reply to Professor Baxi*, Law & Society Review, Vol. 8 No. 4, Summer, pp. 657-59

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