grounds. For the first time then moral considerations appear as an ingredient in Contract-law, and the Real Contract differs from its two predecessors in being founded on these, rather than on respect for technical forms or on deference to Roman domestic habits.

We now reach the fourth class, or Consensual Contracts, the most interesting and important of all. Four specified Contracts were distinguished by this name: Mandatum, *i.e.* Commission or Agency; Societas or Partnership; Emtio Venditio or Sale; and Locatio Conductio or Letting and Hiring. A few pages back, after stating that a Contract consisted of a Pact or Convention to which an Obligation had been superadded, I spoke of certain acts or formalities by which the law permitted the Obligation to be attracted to the Pact. I used this language on account of the advantage of a general expression, but it is not strictly correct unless it be understood to include the negative as well as the positive. For, in truth, the peculiarity of these Consensual Contracts is that *no* formalities are required to create them of the Pact. Much that is indefensible, and much more that is obscure, has been written about the Consensual Contracts, and it has even been asserted that in them the *consent* of the Parties is more emphatically given than in any other species of agreement. But the term Consensual merely indicates that the Obligation is here annexed at once to the *Consensus*. The Consensus, or mutual assent of the parties, is the final and crowning ingredient in the Convention, and it is the special characteristic of agreements falling under one of the four heads of Sale, Partnership, Agency, and Hiring, that, as soon as the assent of the parties has supplied this ingredient, there is *at once* a Contract. The Consensus draws with it the Obligation, performing, in transactions of the sort specified, the exact functions which are discharged, in the other contracts, by the *Res* or Thing, by the *Verba* stipulationis, and by the *Literæ* or written entry in a ledger. Consensual is therefore a term which does not involve the slightest anomaly, but is exactly analogous to Real, Verbal, and Literal.

In the intercourse of life the commonest and most important of all the contracts are unquestionably the four stlyed Consensual. The larger part of the collective existence of every community is consumed in transactions of buying and selling, of letting and hiring, of alliances between men for purposes of business, or delegation of business from one man to another; and this is no doubt the consideration which led the Romans, as it has led most societies, to relieve these transactions from technical incumbrance, to abstain as much as possible from clogging the most efficient springs of social movement.

6. *Organic Solidarity and Contract*

BY EMILE DURKHEIM

I

IF HIGHER societies do not rest upon a fundamental contract which sets forth the general principles of political life, they would have, or would be considered to have, according to Spencer, the vast system of particular contracts which link individuals as a unique basis. They would depend upon the group only in proportion to their dependence upon one another, and they would depend upon one another only in proportion to conventions privately entered into and freely concluded. Social solidarity would then be nothing else than the spontaneous accord of individual interests, an accord of which contracts are the natural expression. The typical social relation would be the economic, stripped of all regulation and resulting from the entirely free initiative of the parties. In short, society would be solely the stage where individuals exchanged the products of their labor, without any action properly social coming to regulate this exchange.

Is this the character of societies whose unity is produced by the division of labor? If this were so, we could with justice doubt their stability. For if interest relates men, it is never for more than some

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few moments. It can create only an external link between them. In the fact of exchange, the various agents remain outside of each other, and when the business has been completed, each one retires and is left entirely on his own. Consciences are only superficially in contact; they neither penetrate each other, nor do they adhere. If we look further into the matter, we shall see that this total harmony of interests conceals a latent or deferred conflict. For where interest is the only ruling force each individual finds himself in a state of war with every other since nothing comes to mollify the egos, and any truce in this eternal antagonism would not be of long duration. There is nothing less constant than interest. Today, it unites me to you; tomorrow, it will make me your enemy. Such a cause can only give rise to transient relations and passing associations. We now understand how necessary it is to see if this is really the nature of organic solidarity.

In no respect, according to Spencer, does industrial society exist in a pure state. It is a partially ideal type which slowly disengages itself in the evolutionary process, but it has not yet been completely realized. Consequently, to rightly attribute to it the qualities we have just been discussing, we would have to establish systematically that societies appear in a fashion as complete as they are elevated, discounting cases of regression.

It is first affirmed that the sphere of social activity grows smaller and smaller, to the great advantage of the individual. But to prove this proposition by real instances, it is not enough to cite, as Spencer does, some cases where the individual has been effectively emancipated from collective influence. These examples, numerous as they may be, can serve only as illustrations, and are, by themselves, devoid of any demonstrative force. It is very possible that, in this respect, socal action has regressed, but that, in other respects, it has been extended, and that, ultimately, we are mistaking a transformation for a disappearance. The only way of giving objective proof is not to cite some facts taken at random, but to follow historically, from its origins until recent times, the way in which social action has essentially manifested itself, and to see whether, in time, it has added or lost volume. We know that this is law. The obligations that society imposes upon its members, as inconsequential and unenduring as they may be, take on a juridicial form. Consequently, the relative dimensions of this system permit us to measure with exactitude the relative extent of social action.

But is is very evident that, far from diminishing, it grows greater and greater and becomes more and more complex. The more primitive a code is, the smaller its volume. On the contrary, it is as large as it is more recent. There can be no doubt about this. To be sure, it does not result in making the sphere of individual activity smaller. We must not forget that if there is more regulation in life, there is more life in general. This is sufficient proof that social discipline has not been relaxing. One of its forms tends, it is true, to regress, as we have already seen, but others, much richer and much more complex, develop in its place. If repressive law loses ground, restitutive law, which originally did not exist at all, keeps growing. If society no longer imposes upon everybody certain uniform practices, it takes greater care to define and regulate the special relations between different social functions, and this activity is not smaller because it is different.

Spencer would reply that he had not insisted upon the dimunition of every kind of control, but only of positive control. Let us admit this distinction. Whether it be positive or negative, the control is none the less social, and the principal question is to understand whether it has extended itself or contracted. Whether it be to command or to deny, to say *Do this* or *Do not do that,* if society intervenes more, we have not the right to say that individual spontaneity suffices more and more in all spheres. If the rules determining conduct have multiplied, whether they be imperative or prohibitive, it is not true that it depends more and more completely on private initiative.

But has this distinction itself any foundation? By positive control, Spencer means that which commands action, while negative control commands only abstention. As he says: A man has a piece of land; I cultivate it for him either wholly or in part, or else I impose upon him either wholly or in part the way in which he should cultivate it. This is a positive control. On the other hand, I give him neither aid nor advice about its cultivation; I simply do not molest my neighbor's crop, or trespass upon my neighbor's land, or put rubbish on his clearing. This is a negative control. The difference is very marked between ordering him to follow, as a citizen, a certain course, or suggesting means for the citizen to employ, and, on the other hand, not disturbing the course which some citizen is pursuing. If such is the meaning of these terms, then positive control is not disappearing.

We know, of course, that restitutive law is growing. But, in the large majority of cases, it either points out to a citizen the course he ought to pursue, or it interests itself in the means that this citizen is employing to attain his end. It answers the two following questions for each juridical relation: (1) Under what conditions and in what form does it normally exist? (2) What are the obligations

it entails? The determination of the form and the conditions is essentially positive, since it forces the individual to follow a certain procedure in order to attain his end. As for the obligations, if they only forbid, in principle, our troubling another person in the exercise of his functions, Spencer's thesis would be true, at least in part. But they consist most often in the statement of services of a positive nature.

On this point we must go into some detail.

II

It is quite true that contractual relations, which originally were rare or completely absent, multiply as social labor becomes divided. But what Spencer seems to have failed to see is that non-contractual relations develop at the same time.

First, let us examine that part of law which is improperly termed private, and which, in reality, regulates diffuse social functions, or what may be called the visceral life of the social organism.

In the first place, we know that domestic law, as simple as it was in the beginning, has become more and more complex. That is to say, that the different species of juridical relations to which family life gives rise are much more numerous than heretofore. But the obligations which result from this are of an eminently positive nature; they constitute a reciprocity of rights and duties. Moreover, they are not contractual, at least in their typical form. The conditions upon which they are dependent are related to our personal status which, in turn, depends upon birth, on our consanguineous relations, and, consequently, upon facts which are beyond volition.

Marriage and adoption, however, are sources of domestic relations, and they are contracts. But it rightly happens that the closer we get to the most elevated social types, the more also do these two juridical operations lose their properly contractual character.

Not only in lower societies, but in Rome itself until the end of the Empire, marriage remains an entirely private affair. It generally is a sale, real among primitive people, later fictive, but valid only through the consent of the parties duly attested. Neither solemn formalities of any kind nor intervention by some authority were then necessary. It is only with Christianity that marriage took on another character. The Christians early got into the habit of having their union consecrated by a priest. An act of the emperor Leo the Philosopher converted this usage into a law for the East. The Council of Trent sanctioned it likewise for the West. From then on, marriage ceased to be freely contracted, and was concluded through the intermediary of a public power, the Church, and the role that the Church played was not only that of a witness, but it was she and she alone who created the juridical tie which until then the wills of the participants sufficed to establish. We know how, later, the civil authority was substituted in this function for the religious authority, and how at the same time the part played by society and its necessary formalities was extended.*

The history of the contract of adoption is still more instructive.

We have already seen with what facility and on what a large scale adoption was practiced among the Indian tribes of North America. It could give rise to all the forms of kinship. If the adopted was of the same age as the adopting, they became brothers and sisters; if the adopted was already a mother, she became the mother of the one who adopted her.

Among the Arabs, before Mohammed, adoption often served to establish real families. It frequently happened that several persons would mutually adopt one another. They then became brothers and sisters, and the kinship which united them was just as strong as if they had been descended from a common origin. We find the same type of adoption among the Slavs. Very often, the members of different families became brothers and sisters and formed was is called a confraternity (*probatinstvo*). These societies were contracted for freely and without formality; agreement was enough to establish them. Moreover, the tie which binds these elective brothers is even stronger than that which results from natural fraternity.

Among the Germans, adoption was probably quite as easy and frequent. Very simple ceremonies were enough to establish it. But in India, Greece, and Rome, it was already subordinated to determined conditions. The one adopting had to be of a certain age, could not stand in such relation to the age of the adopted that it would be impossible to be his natural father. Ultimately, this change of family became a highly complex juridical operation which necessitated the intervention of a magistrate. At the same time, the number of those who could enjoy the right of adoption became more restricted. Only the father of a family or a bachelor *sui juris* could adopt, and the first could, only if he had no legitimate children.

In our current law the restrictive conditions have been even more multiplied. The adopted must be of age, the adopting must be more than fifty years of age, and have long treated the adopted as his

* Of course, the case is the same for the dissolution of the conjugal bond.

child. We must notice that, thus limited, it has become a very rare event. Before the appearance of the French Code, the whole procedure had almost completely fallen into disuse, and today it is, in certain countries such as Holland and lower Canada, not permitted at all.

At the same time that it became more rare, adoption lost its efficacy. In the beginning, adoptive kinship was in all respects similar to natural kinship. In Rome, the similarity was still very great. It was no longer, however, a perfect identity. In the sixteenth century, the adopted no longer has the right of succession if the adoptive father dies intestate. The French Code has re-established this right, but the kinship to which the adoption gives rise does not extend beyond the adopting and the adopted.

We see how insufficient the traditional explanation is, which attributes this custom of adoption among ancient societies to the need of assuring the perpetuity of the ancestral cult. The peoples who have practiced it in the greatest and freest manner, as the Indians of America, the Arabs, the Slavs, had no such cult, and, furthermore, at Rome and Athens, where domestic religion was at its height, this law is for the first time submitted to control and restrictions. If it was able to satisfy these needs, it was not established to satisfy them, and, inversely, if it tends to disappear, it is not because we have less desire to perpetuate our name and our race. It is in the structure of actual societies and in the place which the family occupies that we must seek the determining cause for this change.

Another proof of the truth of this is that it has become even more impossible to leave a family by an act of private authority than to enter into it. As the kinship-tie does not result from a contract, it cannot be broken as a contract can. Among the Iroquois, we sometimes see a part of a clan leave to go to join a neighboring clan. Among the Slavs, a member of the Zadruga who is tired of the common life can separate himself from the rest of the family and become a juridical stranger to it, even as he can be excluded by it. Among the Germans, a ceremony of some slight complexity permitted every Frank who so desired to completely drop off all kinship-obligations. In Rome, the son could not leave the family of his own will, and by this sign we recognize a more elevated social type. But the tie that the son could not break could be broken by the father. Thus was emancipation possible. Today neither the father nor the son can alter the natural state of domestic relations. They remain as birth determines them.

In short, at the same time that domestic obligations become more numerous, they take on, as is said, a public character. Not only in early times do they not have a contractural origin, but the role which contract plays in them becomes ever smaller. On the contrary, social control over the manner in which they form, break down, and are modified, becomes greater. The reason lies in the progressive effacement of segmental organization. The family, in truth, is for a long time a veritable social segment. In origin, it confounds itself with the clan. If, later, it becomes distinguished from the clan, it is as a part of the whole. It is a product of a secondary segmentation of the clan, identical with that which has given birth to the clan itself, and when the latter has disappeared, it still keeps the same quality. But everything segmental tends to be more and more reabsorbed into the social mass. That is why the family is forced to transform itself. Instead of remaining an autonomous society along side of the great society, it becomes more and more involved in the system of social organs. It even becomes one of the organs, charged with special functions, and, accordingly, everything that happens within it is capable of general repercussions. That is what brings it about that the regulative organs of society are forced to intervene in order to exercise a moderating influence over the functioning of the family, or even, in certain cases, a positively arousing influence.

But it is not only outside of contractual relations, it is in the play of these relations themselves that social action makes itself felt. For everything in the contract is not contractual. The only engagements which deserve this name are those which have been desired by the individuals and which have no other origin except in this manifestation of free will. Inversely, every obligation which has not been mutually consented to has nothing contractual about it. But wherever a contract exists, it is submitted to regulation which is the work of society and not that of individuals, and which becomes ever more voluminous and more complicated.

It is true that the contracting parties can, in certain respects, arrange to act contrary to the dispositions of the law. But, of course, their rights in this regard are not unlimited. For example, the agreement of the parties cannot make a contract valid if it does not satisfy the conditions of validity required by law. To be sure, in the great majority of cases, a contract is no longer restricted to determined forms. Still it must not be forgotten that there are in our Codes solemn contracts. But if law no longer has the formal exigencies of yesterday, it subjects contracts to engagements of a different sort. It refuses all obligatory force to engagements contracted by an incompetent, or without object, or with illicit purpose, or made by a

person who cannot sell, or transact over an article which cannot be sold. Among the obligations which it attaches to various contracts, there are some which cannot be changed by any stipulation. Thus, a vendor cannot fail in his obligation to guarantee the purchaser against any eviction which results from something personal to the vendor (art. 1628); he cannot fail to repay the purchase-price in case of eviction, whatever its origin, provided that the buyer has not known of the danger (art. 1629), nor to set forth clearly what is being contracted for (art. 1602). Indeed, in a certain measure, he cannot be exempt from guaranteeing against hidden defects (arts. 1641 and 1643), particularly when known. If it is a question of fixtures, it is the buyer who must not profit from the situation by imposing a price too obviously below the real value of the thing (art. 1674), etc. Moreover, everything that relates to proof, the nature of the actions to which the contract gives a right, the time in which they must be begun, is absolutely independent of individual transactions.

In other cases social action does not manifest itself only by the refusal to recognize a contract formed in violation of the law, but by a positive intervention. Thus, the judge can, whatever the terms of the agreement, grant a delay to a debtor (arts. 1184, 1244, 1655, 1900), or even oblige the borrower to restore the article to the lender before the term agreed upon, if the latter has pressing need of it (art. 1189). But what shows better than anything else that contracts give rise to obligations which have not been contracted for is that they "make obligatory not only what there is expressed in them, but also all consequences which equity, usage, or the law imputes from the nature of the obligation" (art. 1135). In virtue of this principle, there must be supplied in the contract "clauses pertaining to usage, although they may not be expressed therein" (art. 1160).

But even if social action should not express itself in this way, it would not cease to be real. The possibility of derogating the law, which seems to reduce the contractual right to the role of eventual substitute for contracts properly called, is, in the very great majority of cases, purely theoretical. We can convince ourselves of this by showing what it consists in.

To be sure, when men unite in a contract, it is because, through the division of labor, either simple or complex, they need each other. But in order for them to co-operate harmoniously, it is not enough that they enter into a relationship, nor even that they feel the state of mutual dependence in which they find themselves. It is still necessary that the conditions of this co-operation be fixed for the duration of their relations. The rights and duties of each must be defined, not only in view of the situation such as it presents itself at the moment when the contract is made, but with foresight for the circumstances which may arise to modify it. Otherwise, at every instant, there would be conflicts and endless difficulties. We must not forget that, if the division of labor makes interests solidary, it does not confound them; it keeps them distinct and opposite. Even as in the internal workings of the individual organism each organ is in conflict with others while co-operating with them, each of the contractants, while needing the other, seeks to obtain what he needs at the least expense; that is to say, to acquire as many rights as possible in exchange for the smallest possible obligations.

It is necessary therefore to pre-determine the share of each, but this cannot be done according to a preconceived plan. There is nothing in the nature of things from which one can deduce what the obligations of one or the other ought to be until a certain limit is reached. Every determination of this kind can only result in compromise. It is a compromise between the rivalry of interests present and their solidarity. It is a position of equilibrium which can be found only after more or less laborious experiments. But it is quite evident that we can neither begin these experiments over again nor restore this equilibrium at fresh expense every time that we engage in some contractual relation. We lack all ability to do that. It is not at the moment when difficulties surge upon us that we must resolve them, and, moreover, we can neither foresee the variety of possible circumstances in which our contract will involve itself, nor fix in advance with the aid of simple mental calculus what will be in each case the rights and duties of each, save in matters in which we have a very definite experience. Moreover, the material conditions of life oppose themselves to the repetition of such operations. For, at each instant, and often at the most inopportune, we find ourselves contracting, either for something we have bought, or sold, somewhere we are traveling, our hiring of one's services, some acceptance of hostelry, etc. The greater part of our relations with others is of a contractual nature. If, then, it were necessary each time to begin the struggles anew, to again go through the conferences necessary to establish firmly all the conditions of agreement for the present and the future, we would be put to rout. For all these reasons, if we were linked only by the terms of our contracts, as they are agreed upon, only a precarious solidarity would result.

But contract-law is that which determines the juridical consequences of our acts that we have not determined. It expresses the normal conditions of

equilibrium, as they arise from themselves or from the average. A résumé of numerous, varied experiences, what we cannot foresee individually is there provided for, what we cannot regulate is there regulated, and this regulation imposes itself upon us, although it may not be our handiwork, but that of society and tradition. It forces us to assume obligations that we have not contracted for, in the exact sense of the word, since we have not deliberated upon them, nor even, occasionally, had any knowledge about them in advance. Of course, the initial acts is always contractual, but there are consequences, sometimes immediate, which run over the limits of the contract. We co-operate because we wish to, but our voluntary co-operation creates duties for us that we did not desire.

From this point of view, the law of contracts appears in an entirely different light. It is no longer simply a useful complement of individual conventions; it is their fundamental norm. Imposing itself upon us with the authority of traditional experience, it constitutes the foundation of our contractual relations. We cannot evade it, except partially and accidentally. The law confers its rights upon us and subjects us to duties deriving from such acts of our will. We can, in certain cases, abandon them or change them for others. But both are none the less the normal type of rights and duties which circumstance lays upon us, and an express act is necessary for their modification. Thus, modifications are relatively rare. In principle, the rule applies; innovations are exceptional. The law of contracts exercises over us a regulative force of the greatest importance, since it determines what we ought to do and what we can require. It is a law which can be changed only by the consent of the parties, but so long as it is not abrogated or replaced, it guards its authority, and, moreover, a legislative act can be passed only in rare cases. There is, then, only a difference of degree between the law which regulates the obligations which that contract engenders and those which fix the other duties of citizens.

Finally, besides this organized, defined pressure which law exercises, there is one which comes from custom. In the way in which we make our contracts and in which we execute them, we are held to conform to rules which, though not sanctioned either directly or indirectly by any code, are none the less imperative. There are professional obligations, purely moral, which are, however, very strict. They are particularly apparent in the so-called liberal professions, and if they are perhaps less numerous in others, there is place for demanding them, as we shall see, if such demand is not the result of a morbid condition. But if this action is more diffuse than the preceding, it is just as social. Moreover, it is necessarily as much more extended as the contractual relations are more developed, for it is diversified like contracts.

In sum, a contract is not sufficient unto itself, but is possible only thanks to a regulation of the contract which is originally social. It is implied, first, because it has for its function much less the creation of new rules than the diversification in particular cases of pre-established rules; then, because it has and can have the power to bind only under certain conditions which it is necessary to define. If, in principle, society lends it an obligatory force, it is because, in general, the accord of particular wills suffices to assure, with the preceding reservations, the harmonious coming together of diffuse social functions. But if it conflicts with social purposes, if it tends to trouble the regular operation of organs, if, as is said, it is not just, it is necessary, while depriving it of all social value, to strip it of all authority as well. The role of society is not, then, in any case, simply to see passively that contracts are carried out. It is also to determine under what conditions they are executable, and if it is necessary, to restore them to their normal form. The agreement of parties cannot render a clause just which by itself is unjust, and there are rules of justice whose violation social justice prevents, even if it has been consented to by the interested parties.

A regulation whose extent cannot be limited in advance is thus necessary. A contract, says Spencer, has for its object assuring the worker the equivalent of the expense which his work has cost him. If such is truly the role of a contract, it will never be able to fulfill it unless it is more minutely regulated than it is today, for it surely would be a miracle if it succeeded in bringing about this equivalence. In fact, it is as much the gain which exceeds the expense, as the expense which exceeds the gain, and the disproportion is often striking. But, replies a whole school, if the gains are too small, the function will be abandoned for others. If they are too high, they will be sought after and this will diminish the profits. It is forgotten that one whole part of the population cannot thus quit its task, because no other is accessible to it. The very ones who have more liberty of movement cannot replace it in an instant. Such revolutions always take long to accomplish. While waiting, unjust contracts, unsocial by definition, have been executed with the agreement of society, and when the equilibrium in this respect has been reestablished, there is no reason for not breaking it for another.

There is no need for showing that this intervention, under its different forms, is of an eminently positive nature, since it has for its purpose the de-

termination of the way in which we ought to cooperate. It is not it, it is true, which gives the impulse to the functions concurring, but once the concourse has begun, it rules it. As soon as we have made the first step towards cooperation, we are involved in the regulative action which society exercises over us. If Spencer qualified this as negative, it is because, for him, contract consists only in exchange. But, even from this point of view, the expression he employs is not exact. No doubt, when, after having an object delivered, or profiting from a service, I refuse to furnish a suitable equivalent, I take from another what belongs to him, and we can say that society, by obliging me to keep my promise, is only preventing an injury, an indirect aggression. But if I have simply promised a service without having previously received remuneration, I am not less held to keep my engagement. In this case, however, I do not enrich myself at the expense of another; I only refuse to be useful to him. Moreover, exchange, as we have seen, is not all there is to a contract. There is also the proper harmony of functions concurring. They are not only in contact for the short time during which things pass from one hand to another; but more extensive relations necessarily result from them, in the course of which it is important that their solidarity be not troubled.

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IV

The following propositions sum up the first part of our work.

Social life comes from a double source, the likeness of consciences and the division of social labor. The individual is socialized in the first case, because, not having any real individuality, he becomes, with those whom he resembles, part of the same collective type; in the second case, because, while having a physiognomy and a personal activity which distinguishes him from others, he depends upon them in the same measure that he is distinguished from them, and consequently upon the society which results from their union.

The similitude of consciences gives rise to juridical rules which, with the threat of repressive measures, impose uniform beliefs and practices upon all. The more pronounced this is, the more completely is social life confounded with religious life, and the nearer to communism are economic institutions.

The division of labor gives rise to juridical rules which determine the nature and the relations of divided functions, but whose violation calls forth only restitutive measures without any expiatory character.

Each of these bodies of juridical rules is, moreover, accompanied by a body of purely moral rules. Where penal law is very voluminous, common morality is very extensive; that is to say, there is a multitude of collective practices placed under the protection of public opinion. 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. These are usages and customs common to the same order of functionaries which no one of them can break without incurring the censure of the corporation.* This morality is distinguished from the preceding by differences analogous to those which separate the two corresponding types of law. It is localized in a limited region of society. Moreover, the repressive character of the sanctions attaching to it is much less accentuated. Professional misdeeds call forth reprobation much more feeble than attacks against public morality.

The rules of occupational morality and justice, however, are as imperative as the others. They force the individual to act in view of ends which are not strictly his own, to make concessions, to consent to compromises, to take into account interests higher than his own. Consequently, even where society relies most completely upon the division of labor, it does not become a jumble of juxtaposed atoms, between which it can establish only external, transient contacts. Rather the members are united by ties which extend deeper and far beyond the short moments during which the exchange is made. Each of the functions that they exercise is, in a fixed way, dependent upon others, and with them forms a solidary system. Accordingly, from the nature of the chosen task permament duties arise. Because we fill some certain domestic or social function, we are involved in a complex of obligations from which we have no right to free ourselves. There is, above all, an organ upon which we are tending to depend more and more; this is the State. The points at which we are in contact with it multiply as do the occasions when it is entrusted with the duty of reminding us of the sentiment of common solidarity.

Thus, altruism is not destined to become, as Spencer desires, a sort of agreeable ornament to social life, but it will forever be its fundamental basis. How can we ever really dispense with it? Men cannot live together without acknowledging, and,

* This censure, moreover, just as all moral punishment, is translated into external movements (discipline, dismissal of employees, loss of relations, etc.).

consequently, making mutual sacrifices, without tying themselves to one another with strong, durable bonds. Every society is a moral society. In certain respects, this character is even more pronounced in organized societies. Because the individual is not sufficient unto himself, it is from society that he receives everything necessary to him, as it is for society that he works. Thus is formed a very strong sentiment of the state of dependence in which he finds himself. He becomes accustomed to estimating it as its just value, that is to say, in regarding himself as part of a whole, the organ of an organism. Such sentiments naturally inspire not only mundane sacrifices which assure the regular development of daily social life, but even, on occasion, acts of complete self-renunciation and wholesale abnegation. On its side, society learns to regard its members no longer as things over which it has rights, but as co-operators whom it cannot neglect and towards whom it owes duties. Thus, it is wrong to oppose a society which comes from a community of beliefs to one which has a co-operative basis, according only to the first a moral character, and seeing in the latter only an economic grouping. In reality, co-operation also has its intrinsic morality. There is, however, reason to believe, as we shall see later, that in contemporary societies this morality has not yet reached the high development which would now seem necessary to it.

But it is not of the same nature as the other. The other is strong only if the individual is not. Made up of rules which are practiced by all indistinctly, he receives from this universal, uniform practice an authority which bestows something super- upon it, and which puts it beyond the pale of discussion. The co-operative society, on the contrary, develops in the measure that individual personality becomes stronger. As regulated as a function may be, there is a large place always left for personal initiative. A great many of the obligations sanctioned have their origin in a choice of the will. It is we who choose our professions, and even certain of our domestic functions. Of course, once our resolution has ceased to be internal and has been externally translated by social consequences, we are tied down. Duties are imposed upon us that we have not expressly desired. It is, however, through a voluntary act that this has taken place. Finally, because these rules of conduct relate, not to the conditions of common life, but to the different forms of professional activity, they have a more temporal character, which, while lessening their obligatory force, renders them more accessible to the action of men.

There are, then, two great currents of social life to which two types of structure, not less different, correspond.

Of these currents, that which has its origin in social similitudes first runs on alone and without a rival. At this moment, it confounds itself with the very life of society; then, little by little, it canalizes, rarefies, while the second is always growing. Indeed, the segmental structure is more and more covered over by the other, but without ever completely disappearing.

III–ORGANIZATION OF THE ECONOMY

1. The Market

BY MAX WEBER

BY THE "market situation" (*Marktage*) for any object of exchange is meant all the opportunities of exchanging it for money which are known by the participants in the market situation to be available to them and relevant in orienting their attitudes to prices and to competition.

"Marketability" (*Marktgängigkeit*) is the degree of regularity with which an object tends to be an object of exchange on the market.

"Market freedom" is the degree of autonomy en-

Reprinted from Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons, ed. Talcott Parsons (2d ed.; Glencoe, Ill.: The Free Press, 1956), pp. 181–86.

I–THE ELEMENTS OF DEVIANCE AND SOCIAL CONTROL

1. *On the Normality of Crime*

BY EMILE DURKHEIM

IF THERE is any fact whose pathological character appears incontestable, that fact is crime. All criminologists are agreed on this point. Although they explain this pathology differently, they are unanimous in recognizing it. But let us see if this problem does not demand a more extended consideration.

We shall apply the foregoing rules. Crime is present not only in the majority of societies of one particular species but in all societies of all types. There is no society that is not confronted with the problem of criminality. Its form changes; the acts thus characterized are not the same everywhere; but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression. If, in proportion as societies pass from the lower to the higher types, the rate of criminality, i.e., the relation between the yearly number of crimes and the population, tended to decline, it might be believed that crime, while still normal, is tending to lose this character of normality. But we have no reason to believe that such a regression is substantiated. Many facts would seem rather to indicate a movement in the opposite direction. From the beginning of the [nineteenth] century, statistics enable us to follow the course of criminality. It has everywhere increased. In France the increase is nearly 300 per cent. There is, then, no phenomenon that presents more indisputably all the symptoms of normality, since it appears closely connected with the conditions of all collective life. To make of crime a form of social morbidity would be to admit that morbidity is not something accidental, but, on the contrary, that in certain cases it grows out of the fundamental constitution of the living organism; it would result in wiping out all distinction between the physiological and the pathological. No doubt it is possible that crime itself will have abnormal forms as, for example, when its rate is unusually high. This excess is, indeed, undoubtedly morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for each social type, a certain level, which it is perhaps not impossible to fix in conformity with the preceding rules.[1]

Here we are, then, in the presence of a conclusion in appearance quite paradoxical. Let us make no mistake. To classify crime among the phenomena of normal sociology is not to say merely that it is an inevitable, although regrettable phenomenon, due to the incorrigible wickedness of men; it is to affirm that it is a factor in public health, an integral part of all healthy societies. This result is, at first glance, surprising enough to have puzzled even ourselves for a long time. Once this first surprise has been overcome, however, it is not difficult to find reasons explaining this normality and at the same time confirming it.

In the first place crime is normal because a society exempt from it is utterly impossible. Crime, we have shown elsewhere, consists of an act that offends certain very strong collective sentiments. In a society in which criminal acts are no longer committed, the sentiments they offend would have to be found without exception in all individual consciousnesses, and they must be found to exist with the same degree as sentiments contrary to them. Assuming that this condition could actually be realized, crime would not thereby disappear; it would only change its form, for the very cause which would thus dry up the sources of criminality would immediately open up new ones.

Reprinted from Emile Durkheim, *The Rules of Sociological Method*, trans. Sarah Solovay and John Mueller, ed. George E. G. Catlin (Glencoe, Ill.: The Free Press, 1950), pp. 65–75, with the permission of The Free Press.

1. From the fact that crime is a phenomenon of normal sociology, it does not follow that the criminal is an individual normally constituted from the biological and psychological points of view. The two questions are independent of each other. This independence will be better understood when we have shown, later on, the difference between psychological and sociological facts.

Indeed, for the collective sentiments which are protected by the penal law of a people at a specified moment of its history to take possession of the public conscience or for them to acquire a stronger hold where they have an insufficient grip, they must acquire an intensity greater than that which they had hitherto had. The community as a whole must experience them more vividly, for it can acquire from no other source the greater force necessary to control these individuals who formerly were the most refractory. For murderers to disappear, the horror of bloodshed must become greater in those social strata from which murderers are recruited; but, first it must become greater throughout the entire society. Moreover, the very absence of crime would directly contribute to produce this horror; because any sentiment seems much more respectable when it is always and uniformly respected.

One easily overlooks the consideration that these strong states of the common consciousness cannot be thus reinforced without reinforcing at the same time the more feeble states, whose violation previously gave birth to mere infraction of convention —since the weaker ones are only the prolongation, the attenuated form of the stronger. Thus robbery and simple bad taste injure the same single altruistic sentiment, the respect for that which is another's. However, this same sentiment is less grievously offended by bad taste than by robbery; and since, in addition, the average consciousness has not sufficient intensity to react keenly to the bad taste, it is treated with greater tolerance. That is why the person guilty of bad taste is merely blamed, whereas the thief is punished. But, if this sentiment grows stronger, to the point of silencing in all consciousnesses the inclination which disposes man to steal, he will become more sensitive to the offenses which, until then, touched him but lightly. He will react against them, then, with more energy; they will be the object of greater opprobrium, which will transform certain of them from the simple moral faults that they were and give them the quality of crimes. For example, improper contracts, or contracts improperly executed, which only incur public blame or civil damages, will become offenses in law.

Imagine a society of saints, a perfect cloister of exemplary individuals. Crimes, properly so called, will there be unknown; but faults which appear venial to the layman will create there the same scandal that the ordinary offense does in ordinary consciousnesses. If, then, this society has the power to judge and punish, it will define these acts as criminal and will treat them as such. For the same reason, the perfect and upright man judges his smallest failings with a severity that the majority reserve for acts more truly in the nature of an offense. Formerly, acts of violence against persons were more frequent than they are today, because respect for individual dignity was less strong. As this has increased, these crimes have become more rare; and also, many acts violating this sentiment have been introduced into the penal law which were not included there in primitive times.[2]

In order to exhaust all the hypotheses logically possible, it will perhaps be asked why this unanimity does not extend to all collective sentiments without exception. Why should not even the most feeble sentiment gather enough energy to prevent all dissent? The moral consciousness of the society would be present in its entirety in all the individuals, with a vitality sufficient to prevent all acts offending it—the purely conventional faults as well as the crimes. But a uniformity so universal and absolute is utterly impossible; for the immediate physical milieu in which each one of us is placed, the hereditary antecedents, and the social influences vary from one individual to the next, and consequently diversify consciousnesses. It is impossible for all to be alike, if only because each one has his own organism and that these organisms occupy different areas in space. This is why, even among the lower peoples, where individual originality is very little developed, it nevertheless does exist.

Thus, since there cannot be a society in which the individuals do not differ more or less from the collective type, it is also inevitable that, among these divergences, there are some with a criminal character. What confers this character upon them is not the intrinsic quality of a given act but that definition which the collective conscience lends them. If the collective conscience is stronger, if it has enough authority practically to suppress these divergences, it will also be more sensitive, more exacting; and, reacting against the slightest deviations with the energy it otherwise displays only against more considerable infractions, it will attribute to them the same gravity as formerly to crimes. In other words, it will designate them as criminal.

Crime is, then, necessary; it is bound up with the fundamental conditions of all social life and by that very fact it is useful, because these conditions of which it is a part are themselves indispensable to the normal evolution of morality and law.

Indeed, it is no longer possible today to dispute the fact that law and morality vary from one social type to the next, nor that they change within the same type if the conditions of life are modified. But, in order that these transformations may be possible, the collective sentiments at the basis of

2. Calumny, insults, slander, fraud, etc.

morality must not be hostile to change, and consequently must have but moderate energy. If they were too strong, they would no longer be plastic. Every pattern is an obstacle to new patterns, to the extent that the first pattern is inflexible. The better a structure is articulated, the more it offers a healthy resistance to all modification; and this is equally true of functional, as of anatomical, organization. If there were no crimes this condition could not have been fulfilled; for such a hypothesis presupposes that collective sentiments have arrived at a degree of intensity unexampled in history. Nothing is good indefinitely and to an unlimited extent. The authority which the moral conscience enjoys must not be excessive; otherwise no one would dare criticize it, and it would too easily congeal into an immutable form. To make progress, individual originality must be able to express itself. In order that the originality of the idealist whose dreams transcend his century may find expression, it is necessary that the originality of the criminal, who is below the level of his time, shall also be possible. One does not occur without the other.

Nor is this all. Aside from this indirect utility, it happens that crime itself plays a useful role in this evolution. Crime implies not only that the way remains open to necessary changes but that in certain cases it directly prepares these changes. Where crime exists, collective sentiments are sufficiently flexible to take on a new form, and crime sometimes helps to determine the form they will take. How many times, indeed, it is only an anticipation of future morality—a step toward what will be! According to Athenian law, Socrates was a criminal, and his condemnation was no more than just. However, his crime, namely the independence of his thought, rendered a service not only to humanity but to his country. It served to prepare a new morality and faith which the Athenians needed, since the traditions by which they had lived until then were no longer in harmony with the current conditions of life. Nor is the case of Socrates unique; it is reproduced periodically in history. It would never have been possible to establish the freedom of thought we now enjoy if the regulations prohibiting it had not been violated before being solemnly abrogated. At that time, however, the violation was a crime, since it was an offense against sentiments still very keen in the average conscience. And yet this crime was useful as a prelude to reforms which daily became more necessary. Liberal philosophy had as its precursors the heretics of all kinds who were justly punished by secular authorities during the entire course of the Middle Ages and until the eve of modern times.

From this point of view the fundamental facts of criminality present themselves to us in an entirely new light. Contrary to current ideas, the criminal no longer seems a totally unsociable being, a sort of parasitic element, a strange and unassimilable body, introduced into the midst of society.[3] On the contrary, he plays a definite role in social life. Crime, for its part, must no longer be conceived as an evil that cannot be too much suppressed. There is no occasion for self-congratulation when the crime rate drops noticeably below the average level, for we may be certain that this apparent progress is associated with some social disorder. Thus, the number of assault cases never falls so low as in times of want.[4] With the drop in the crime rate, and as a reaction to it, comes a revision, or the need of a revision in the theory of punishment. If, indeed, crime is a disease, its punishment is its remedy and cannot be otherwise conceived; thus, all the discussions it arouses bear on the point of determining what the punishment must be in order to fulfil this role of remedy. If crime is not pathological at all, the object of punishment cannot be to cure it, and its true function must be sought elsewhere.

It is far from the truth, then, that the rules previously stated have no other justification than to satisfy an urge for logical formalism of little practical value, since, on the contrary, according as they are or are not applied, the most essential social facts are entirely changed in character. If the foregoing example is particularly convincing—and this was our hope in dwelling upon it—there are likewise many others which might have been cited with equal profit. There is no society where the rule does not exist that the punishment must be proportional to the offense; yet, for the Italian school, this principle is but an invention of jurists, without adequate basis.

For these criminologists the entire penal system, as it has functioned until the present day among all known peoples, is a phenomenon contrary to nature. We have already seen that, for M. Garofalo, the criminality peculiar to lower societies is not at

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3. We have ourselves committed the error of speaking thus of the criminal, because of a failure to apply our rule (*Division du travail social*, pp. 395–96).

4. Although crime is a fact of normal sociology, it does not follow that we must not abhor it. Pain itself has nothing desirable about it; the individual dislikes it as society does crime, and yet it is a function of normal physiology. Not only is it necessarily derived from the very constitution of every living organism, but it plays a useful role in life, for which reason it cannot be replaced. It would, then, be a singular distortion of our thought to present it as an apology for crime. We would not even think of protesting against such an interpretation, did we not know to what accusations and misunderstandings one exposes oneself when one undertakes to study moral facts objectively and to speak of them in a different language from that of the layman.

all natural. For socialists it is the capitalist system, in spite of its wide diffusion, which constitutes a deviation from the normal state, produced, as it was, by violence and fraud. Spencer, on the contrary, maintains that our administrative centralization and the extension of governmental powers are the radical vices of our societies, although both proceed most regularly and generally as we advance in history. We do not believe that scholars have ever systematically endeavored to distinguish the normal or abnormal character of social phenomena from their degree of generality. It is always with a great array of dialectics that these questions are partly resolved.

Once we have eliminated this criterion, however, we are not only exposed to confusions and partial errors, such as those just pointed out, but science is rendered all but impossible. Its immediate object is the study of the normal type. If, however, the most widely diffused facts can be pathological, it is possible that the normal types never existed in actuality; and if that is the case, why study the facts? Such study can only confirm our prejudices and fix us in our errors. If punishment and the responsibility for crime are only the products of ignorance and barbarism why strive to know them in order to derive the normal forms from them? By such arguments the mind is diverted from a reality in which we have lost interest, and falls back on itself in order to seek within itself the materials necessary to reconstruct its world. In order that sociology may treat facts as things, the sociologist must feel the necessity of studying them exclusively.

The principle object of all sciences of life, whether individual or social, is to define and explain the normal state and to distinguish it from its opposite. If, however, normality is not given in the things themselves—if it is, on the contrary, a character we may or may not impute to them—this solid footing is lost. The mind is then complacent in the face of a reality which has little to teach it; it is no longer restrained by the matter which it is analyzing, since it is the mind, in some manner or other, that determines the matter.

The various principles we have established up to the present are, then, closely interconnected. In order that sociology may be a true science of things, the generality of phenomena must be taken as the criterion of their normality.

Our method has, moreover, the advantage of regulating action at the same time as thought. If the social values are not subjects of observation but can and must be determined by a sort of mental calculus, no limit, so to speak, can be set for the free inventions of the imagination in search of the best. For how may we assign to perfection a limit? It escapes all limitation, by definition. The goal of humanity recedes into infinity, discouraging some by its very remoteness and arousing others who, in order to draw a little nearer to it, quicken the pace and plunge into revolutions. This practical dilemma may be escaped if the desirable is defined in the same way as in health and normality and if health is something that is defined as inherent in things. For then the object of our efforts is both given and defined at the same time. It is no longer a matter of pursuing desperately an objective that retreats as one advances, but of working with steady perseverance to maintain the normal state, of re-establishing it if it is threatened, and of rediscovering its conditions if they have changed. The duty of the statesman is no longer to push society toward an ideal that seems attractive to him, but his role is that of the physician: he prevents the outbreak of illnesses by good hygiene, and he seeks to cure them when they have appeared.[5]

5. From the theory developed in this chapter, the conclusion has at times been reached that, according to us, the increase of criminality in the course of the nineteenth century was a normal phenomenon. Nothing is farther from our thought. Several facts indicated by us apropos of suicide (see *Suicide*, pp. 420 ff.) tend, on the contrary, to make us believe that this development is in general morbid. Nevertheless, it might happen that a certain increase of certain forms of criminality would be normal, for each state of civilization has its own criminality. But on this, one can only formulate hypotheses.