Constructing the Juristic Durkheim?

Paul Huvelin's adaptation of Durkheimian sociology

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Introduction

It is well known that law was an important interest for Durkheim and for several of his closest followers and collaborators. But the nature and purposes of his engagement with law are less clear than might be wished and have often been misunderstood. Among writers on sociology of law, understandings of this engagement have usually been shaped by almost exclusive attention to the treatment of law in *The Division of Labour in Society* (1893b/1902b). Here, Durkheim seems to approach legal materials mainly for their capacity to provide, in the documentary form of ancient and modern codes, 'visible symbols' of social solidarity; an 'index' or measure of this elusive phenomenon. While *The Division of Labour* contains his most sustained discussion of legal doctrine from many societies and eras, the comparative and historical study of law is prominently presented in it as a methodological device for examining something that is, apparently, of greater sociological significance than law itself. Hence the sociological study of law appears on one familiar reading of this text as central and peripheral at the same time; a vital means to an end rather than an end in itself.

Durkheim's writings elsewhere (including his many reviews of books on legal subjects), as well as the approach and contents of the *Année sociologique* under his direction, make clear that, from a Durkheimian standpoint, law is far from being a secondary or derivative phenomenon. For Durkheim himself and several of his co-workers, it was a major topic for sociological study; an aspect of social life related (but not reducible) to morality, religion or the changing conditions of social solidarity. Matters are, however, complicated by the changing position of religion in Durkheim's sociology as it developed. In his early work, law appears sometimes to be 'a practical substitute for religion'[1] in modern society, as religion loses its regulatory power. But, in his later work, where the need even

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in modern society for something like religion is asserted (Durkheim 1912a), law's significance again becomes ambiguous or, at least, its function is harder to define. What balance, for example, is to be found between an idea of law as co-ordinating social functions in complex, diverse, modern societies, and an idea of law as expressing a value system or set of beliefs to underpin such complexity?[2]

This paper is concerned with law in the Durkheimian tradition: with Durkheim's approach to law and some ambiguities and limitations of this approach. What follows is part of an ongoing consideration of this subject centred on the way that Durkheim's ideas were adapted to serve the purposes of professional jurists who collaborated with him in the original project of the *Année sociologique*. Though several members of Durkheim's *Année* team had legal qualifications (Vogt 1983:177-178), only two, Paul Huvelin and Emmanuel Lévy, were actually professors of law. Colleagues in the law faculty of the University of Lyon for almost the whole of their academic careers, they were both active contributors to the journal. Lévy was in contact with Durkheim from 1896 and, as an editor and book reviewer, contributed to all volumes of the *Année*'s first series from its commencement in 1898. Huvelin, whom Lévy first put in touch with the Durkheimians, began his association (via Marcel Mauss) in 1899 and contributed from the sixth volume, published in 1903, until the end of the first series (1913).

It is clear that Durkheim valued highly the contribution of the two jurists from Lyon, telling Mauss that he would not know how to replace Lévy in the *Année* team (Durkheim 1998a:49). Huvelin, however, was a more prolific contributor than Lévy. He wrote one major article (Huvelin 1907), forty-one full book reviews and two short notes (Besnard 1983a:32). After Huvelin's premature death in June 1924, Mauss wrote, 'the loss of Huvelin is irreparable for us' (Mauss 1925a:497). Although these jurists have received relatively little discussion in Durkheimian literature, they were clearly much respected members of the team as far as Durkheim and Mauss were concerned.[3] And, recently, they have begun to attract attention among French intellectual historians.[4]

Both Lévy and Huvelin were sympathetic to central aspects of Durkheim's sociology and saw its powerful relevance for legal studies. Yet both felt a need to depart from Durkheim in important ways to make their scholarly work realistic and practically useful. I have discussed Lévy's contribution elsewhere (Cotterrell 2004). This present paper therefore concentrates on Huvelin's work as a response to, and adaptation of, Durkheim's sociology. I use a study by Huvelin to illustrate some problems which Durkheim's ideas posed for sympathetic jurists. The paper considers how one particular legal scholar tried to overcome these problems and to use elements of Durkheim's thinking to develop general sociological insights about law and its history.

Durkheim on law

When he began teaching sociology at Bordeaux, Durkheim made clear his wish to reach out to lawyers and welcomed law students to his lectures (Durkheim 1888a:108-109). Building bridges was surely a necessary strategy given the hostility that his ideas soon provoked from some law faculties. Many jurists were deeply sceptical of Durkheimian sociology. They often caricatured it as focusing on the social rather than the individual, on social forces rather than individual responsibility, and on an unrelenting questioning of traditions and established institutions (Cotterrell 1999:ch.3). Durkheim, for his part, advocated the reform of legal education to make law 'something other than conceptual games' and to show its cultural roots (Durkheim 1907d:244). But he also assumed that sociology could learn much from jurists and legal historians. In 1904, reviewing a book by the great comparative lawyer Édouard Lambert, Durkheim equated the study of comparative legal history with sociology of law, presumably emphasising in this context the 'genetic' rather than the 'functional' side of Durkheimian sociology (1904a(4):266). Comparative legal history could thus be a site of intimate cooperation between sociology and legal studies.

Durkheim's own thinking on law has to be understood as undergoing major changes during his career and leaving unresolved problems for those who have at various times attempted to construct a rigorous theory of law from his work. 'Moral ideas are the soul (*l'âme*) of law,' he writes (1909e: 150). But law is distinguished from morality by a degree of organisation, especially as regards the process of sanctioning breaches of social rules. Legal rules are 'instituted by definite organs and under a definite form and... the whole system which the law uses to realise its precepts is regulated and organised' (1900a(6):320-321). But the only organisation always found in relation to law is a court (*un tribunal*), which might be an assembly of the people as a whole, or an elite of judges (1893b/1902b:63/ t.52). So law's essence is adjudication and judgment, not legislation.

Compared with repressive law, restitutive law has much more extensive organisational needs. Modern law, mainly restitutive, is characterised by boards, administrative agencies, specialised officials, enforcement systems and detailed demarcations of jurisdictions. All of which seems to point towards the idea of law as an instrument of government and to a linking of law and politics. Indeed, Durkheim's early thinking in *The Division of Labour* suggests this. Ultimately, law is not just a reflection or index of moral bonds (of solidarity) but helps form them or even create them. The underlying morality of restitutive law might be considered a kind of official 'governmental morality', aimed at ensuring a good, integrated functioning of social life, rather than any popular morality or reflection of a collective consciousness (Cotterrell 1999:109-112). Law, in this image, is separated more and more from popular moral convictions insofar as these are society-wide. Modern law lives increasingly in regions remote from the heart of the collective consciousness (Durkheim 1893b/1902b: 81/t.69-70).

So it might appear that modern law is to be viewed as an active, powerful agent of governmental steering of society. But this seems not to be Durkheim's view. For him, law as a moral framework is hardly seen politically in any sense. Thus, a sociology of law and morals (these being intimately related) takes the place of a political sociology in the Durkheimian scholarly schema (cf. Favre 1983). Durkheim sees organic solidarity as the normal state of affairs for complex modern societies; anomie and the forced division of labour are abnormal forms. So law's task is not to arbitrate between dominant political interests but to fine-tune society, checking aberrations and freeing normal social processes of development when they become obstructed. Lawmakers, we might say, are like gardeners tending a plant. They do not make it grow and have limited knowledge as to why or how it does. They can only protect and nurture spontaneous processes of development over which they have relatively little control. Sociological laws, not juridical ones, produce solidarity. Social structure and the emergence of appropriate functional relations are the key to this process, not legal intervention as such.

In his work after the publication of *The Division of Labour*, Durkheim pulls back even more from the idea of law as a political force or a directive instrument of government. Two elements in his work, which contrast strongly with the approaches of his earlier writings, are central here. First is his reaffirmation of the value system of individualism as the unifying moral foundation of complex modern societies (Durkheim 1898c). Second is his implicit recognition that all modern law (not just surviving repressive or penal law) is an expression of the specifically modern individualistic content of the collective consciousness (Cotterrell 1999:ch.7). So law is seen eventually by Durkheim in modern (no less than simple or ancient) societies as deeply rooted in culture, in the sense of general beliefs, values, outlooks, attitudes and traditions of thought. The moral value system of individualism is implicit in modern social interaction and necessary to it as the differentiation of societies proceeds. But it is a contingent product of history in certain societies at certain periods. Law, it seems, has the general function of supporting and elaborating this value system; at least, this much is implicit in Durkheim's writings on contract, property, criminal and inheritance law (Cotterrell 1999:chs.5, 8 and 9). Hence law's task is, it seems, primarily an expressive one. Law is to be seen (in modernity as in earlier societies) as a distillation of moral values rather than a political instrument of governmental intervention in social relations. Where the latter use of law is appropriate it is as a derivation from the former.

Huvelin and Durkheimian sociology

For jurists wishing to import Durkheimian ideas into their legal scholarship a main problem has been how to find a significant, well-defined place for law in the edifice of social explanation and the general picture of mod-

ern society which Durkheim's sociology offered. The modern lawyer is typically concerned with using law to make things happen: to right wrongs, achieve justice, promote interests or secure rights. Many jurists in Durkheim's time, no less than now, would be dissatisfied with an image of law as a reflection of the established character of moral life or an index of social solidarity, or as explicable in its operations in terms of a long historical development of social structure (the shifting combinations of forms of social solidarity).[5] If they felt the need for a social theory of law at all, it would most likely be for theory that could recognise an active role for law in shaping society, engaging with power and intervening in or mediating political struggles. Durkheim's view of law might not seem to offer this possibility.

On the other hand, as has been noted, his work emphasises law's rootedness in values, its secure place in culture and its links with deep-rooted beliefs. These ideas, in some respects, elevate law to a place of great moral and cultural significance. Especially if their conservative aspects were stressed, they could be attractive to traditionally-minded lawyers. But since Durkheimian sociology advocated examining the social foundations of values that might be associated with law, it readily appeared threatening to conservative lawyers. It was to progressive, reformist jurists that it offered more attractions, insofar as it suggested that law, to be strong, must be rooted firmly in popular experience and understandings and could be understood as a social force only through empirical study of social change. The status of (conservative) jurists' doctrines might be usefully challenged by a sociological theory that saw the centre of gravity of law not in juristic disputes but in social conditions and popular belief systems.

Paul Huvelin's contact with, and eventual membership of, the Durkheim School may have been promoted initially as much by his restless intellectual curiosity and desire to challenge traditional ideas in his legal field (Appleton 1924:698), as by any wider sociological ambitions. Having obtained his doctorate in law for a thesis on an aspect of the history of commercial law (the law of markets and fairs), he joined the University of Lyon law faculty in 1899, aged 26, and stayed there for the rest of his career, becoming a full professor (of Roman law) in 1903.

Continental jurists were necessarily interested in Roman law as a primary historical foundation of European legal thought. Legal history, which Huvelin taught, was presented to French students largely as the reception, transmission and adaptation of Roman law into French civil law. But tracing the roots of current legal conceptions or traditions to distant sources such as the Twelve Tables of early Roman law (451-450 BC) could seem arbitrary unless one continued to ask where the concepts of this ancient law had come from. The whole approach of using history to expound legal tradition involved a kind of reading back from the ideas of the present to those of the past. So it could appear as a search for origins that might, for a curious and radical scholar, lie beyond the earliest documentary sources of Roman law themselves. Most cautious Roman law specialists would be likely to dismiss

such ultimate inquiries as merely speculative. Huvelin, however, pursued them in a scholarly and imaginative way, using not just specifically legal materials but also information gleaned from other ancient literature. His work shows prodigious erudition combined with 'a pronounced taste for researches that give free flight to the imagination, where the ingenuity of conjectures can be given unfettered scope' (Appleton 1924:701).

He asks about the sources of Roman law itself in 'pre-legal' ideas, focusing on the field then designated as 'very ancient Roman law'; that is, the earliest conceptions of Roman law of which any evidence exists. These ancient legal conceptions are intermingled with religion, myth and magic. Early Roman legal procedures seemed to invoke magical elements (ritual being considered to produce specific effects on individuals' circumstances). To understand this ancient law required a process of imaginative reconstruction. Sketchy evidence of certain procedures and legal concepts was available, but often knowledge was lacking about the full meaning of the concepts or the significance of the procedures.

Huvelin was much impressed with the essay by Marcel Mauss and Henri Hubert on the nature of sacrifice, published in the *Année sociologique* in 1899. With the encouragement of Lévy, Huvelin wrote to Mauss in June of that year, explaining that he now saw the sociology of religion as a key to pursuing his studies. Sociological explanation of the nature of ritual seemed to him very relevant for an understanding of early legal procedures and he asked Mauss for guidance on relevant literature (Huvelin 2001). More generally, Huvelin thought that the work of the Durkheimian scholars might help in understanding how private law—especially the law of property, contract and civil wrongs (tort or delict)—emerged from the general religious matrix of early law which Durkheim had explained in *The Division of Labour*. For Huvelin, the interesting question was how, in societal development, private law (essentially the law of individual claims protecting private interests) became distinct from the general regulatory structures of the collective consciousness. What processes in history made this separate legal development possible?

Law and magic

It was the later essay by Mauss and Hubert, 'Outline of A General Theory of Magic', that gave Huvelin the clue he thought he needed. They saw religion and magic as having common sources in social belief but acting as opposing forces; magic rites do not unite society but are sometimes illicit and often secret, private activities. Magic is close to religion but turns away from the social cohesive function of religion and is a distortion and private appropriation. Magic becomes more individualistic and 'tends towards the concrete' and practical, while religion remains abstract and oriented to the collectivity. Magic is 'an art of doing things', a childish skill, the forerunner of techniques that would later discard all mystical elements. Belief in it is

utilitarian, its value being only in its effects. Its kinship is with religion, on the one hand, and technology, on the other (Mauss and Hubert 1904:134-135/t.174-175). As a primitive technology, it shows how a collective phenomenon can assume individual forms.

Soon after Mauss and Hubert's essay was published in 1904, Durkheim invited Huvelin (who had been contributing to the *Année sociologique* since 1902) to write a full paper for the journal. Huvelin took the opportunity to produce an extremely learned piece on the origins of ideas of individual rights in magic (Huvelin 1907). He did not rely solely on Mauss and Hubert because he had already been exploring the idea that the procedures of early Roman law had magical elements and had published a long paper on the subject some years previously (Huvelin 1901). Nevertheless, Mauss and Hubert's idea of magic's technical power applicable to private ends, but closely related to religion, was of great importance. In 'Magie et droit individuel', Huvelin sees magic as distinguishable from religion by its purposes.[6] A social phenomenon becomes potentially illicit if it is turned to anti-social ends. Thus magic may or may not be illicit or anti-social, depending on how it is used. Huvelin's paper aims to show that one of its uses has been to provide various technical resources necessary for the earliest developments of private law.

First, magic gives individuals access to the power of spiritual forces that can be turned to their chosen private purposes. Second, magic can be a weapon of the wronged against the wrongdoer (for example, where the wrongdoer cannot be identified, magical rites allow some action to be taken against the unknown person). Third, magic can be harnessed as a guarantee of restitution. With the agreement of both parties to a transaction, a magic incantation or procedure provides for a sanction against one party which is to take effect only if that party defaults on undertakings given. Fourth, contracts can be enforced through the power of magical sanctions: future compliance with promises is guaranteed by the invocation of magical bonds between the parties. Fifth, through magic, writing assumes special importance in solemn procedures, the magical power of writing being well understood in many ancient civilisations. Huvelin's essay illustrates these processes and variants on them, with a wealth of detailed comparative examples from ancient history and the early legal (or law-like) practices of many civilisations.

In this way, 'in lending its own force to individual activity, magic prepared the way for legal sanctions' (Huvelin 1907:42). In early stages of legal development, magic allows individual activity to find a place in the purview of a law otherwise inspired by the collective sense of religion. Thereafter, Huvelin suggests, two possibilities present themselves. Sometimes, eventually, magical practices are prohibited once law becomes strong enough to do this. It becomes able to rely on its own resources of enforcement, which shed spiritual or magical elements. Otherwise, law coopts magic rites and rituals, as in the use of oaths, ordeals, formalities of writing and seals, symbolic transfers of property relying on precise rituals.

Huvelin's analysis is highly speculative, yet thoughtful and carefully documented. But is it Durkheimian? For Durkheim, law is social and moral in nature, not private and utilitarian. Yet these latter seem to be magic's characteristics in Durkheim's understanding (1912a:58, 61-62/t.42, 44-45). So how can society's law be built (in part) on magic? The thesis of 'Magie et droit individuel' is, in essence, Huvelin's effort to link restitutive law (indirectly) to religion and the collective consciousness in a way that Durkheim seemed unable to do in *The Division of Labour in Society*; Huvelin's argument is that the link is historical or developmental. He seeks to overcome what, in *The Division of Labour*, appears as the mystery of modern law's moral foundations (Cotterrell 1999:ch.7). For Durkheim (1893b/1902b: 81-83, 97/t.69-71, 82), restitutive law is not connected to the collective consciousness in any significant way. Huvelin claims that individual right (the foundation of all restitutive law) derives indirectly from religion or, more broadly, the matrix of beliefs and understandings that make up the collective consciousness. Over the ages this religious aspect is partly transformed into pure regulatory technique and magic is the medium that enables this to happen. Law distances itself from the religious matrix as technique, but the religious matrix itself makes possible a social evolution that gives rise to this freeing of law in the form of individual rights.

Huvelin seems to preserve what lawyers typically want to see in law: its power and freedom as a technique for providing security and facilitating projects, transactions and relationships. At the same time, he affirms Durkheim's view of law's origin in the religious matrix of early society. The approach was no doubt useful to him as a grounding for his researches on very ancient Roman law, helping to answer the questions: where did this law come from and how was it shaped? It might also have seemed appropriate for a modern jurist anxious to see law as somehow independent of broader aspects of social structure or social experience so as to be able to act on these.

Nevertheless, Huvelin's thesis is ultimately unstable. Is law a moral phenomenon or not? Durkheim (1893b: 276, 277) is clear that it is: law is entirely implicated with morality and inseparable from the conditions and needs of social solidarity; law is not a private resource. Huvelin's answer, however, seems to be both yes and no. On the one hand, law's moral nature is explicable ultimately in terms of its links to religion; on the other hand, private law's origins lie, it seems, in utilitarian technique. Magic provides the template for private law's mechanisms of control. It provides a model for law as a resource for private ends and as a privately appropriated technique. Law, it seems, takes on something of the utilitarian character of magic. This is surely something that Durkheim could not have accepted. For him, the utilitarian view of (a part of) law, implicit in Huvelin's explanation of its origins, would be incompatible with his essentially non-utilitarian conception of morality and with the assumption that law (inseparable from morality) must share morality's character in this respect.

Human bonds

A decade and a half later, just a few months before he died, Huvelin published his most striking effort to adapt Durkheim's thinking to a juristic outlook. He had planned to write an *Introduction to the Study of Law* that would draw on his sociological interests. In April 1923, he gave six lectures at the University of Brussels on 'The Spirit of French Law'. The sociological introduction to the course would have been incorporated into the planned book but ultimately it was the only part published, under the title 'Les cohésions humaines' (Huvelin 1923).

In this lecture, Huvelin tries to address in general sociological terms the question underlying his 'Magie et droit individuel' essay. What predates law? What, in sociological terms, provides the conditions for and shapes the social tasks of law? What gives rise to and makes possible human bonds (*cohésions humaines*)? And what is the place of law in securing and supporting these bonds? This is, of course, another way of posing Durkheim's question about the place of law in supporting or expressing social solidarity. But ultimately Huvelin answers this question in a very different way from Durkheim, whom he calls in the lecture 'my master'. Without Durkheim, declares Huvelin, there would be no sociology of law and, as regards method, 'we still rely on him, even when, as in my case, it is necessary to abandon some of his conclusions' (Huvelin 1923:137).

Huvelin tries to visualise the beginnings of civilization in his inquiry, just as he had in studying ancient Roman law. Law is not the source of social cohesion; something precedes it. The givens of sociological inquiry are (i) individuals in contact with each other, interacting and belonging to groups of many kinds, and (ii) societies. A society is the totality of individuals in a certain field of interaction, or encompassed by the same network of reciprocal influences (ibid.:134). The basis of all human bonds, Huvelin claims, is sympathy, a resonance that draws individuals together and produces positive feelings for another; not feelings of love (which seeks to possess or conquer the other) but of understanding, concern or liking. Sympathy expresses itself in sensitivity to the other and, to some extent (as a derivative characteristic) in imitation of others' ways or situations. It derives from two conditions, often interrelated: proximity and similarity. Thus, a moral unity often naturally arises among neighbours in frequent contact who become accustomed to each other, or among people who perceive themselves as having similar characteristics.

Solidarity, for Huvelin, is 'the totality of conscious and unconscious attractions deriving from sympathy' (ibid.:137). This is the basis of all social groupings in which people voluntarily link their individuality with that of others. Drawing such conclusions, he sees no problems with Durkheim's concept of mechanical solidarity, which he associates with the human bonds of attraction he describes. Yet it is clear that he understands the basis of this solidarity somewhat differently from the 'master', since sympathy provides for him an intermediate psychological element

added to Durkheim's own association of similarity and proximity with mechanical solidarity.

As regards organic solidarity, however, Huvelin appears to break dramatically with Durkheim. He simply denies the existence of this kind of solidarity. The progress of the division of labour gives rise to individuality, which, for Huvelin, undermines solidarity based on sympathy. Remoteness and dissimilarity are sources of antipathy, not sympathy. The appearance of originality is often seen as a source of trouble or scandal; society acts against the innovator who is often seen as a heretic of some kind. But differentiation cannot be prevented; this tendency is just an incontestable fact. Organisation becomes more elaborate with societal development and takes the form of the creation and interrelating of specialised techniques or instruments (*outils*) to secure interdependence. Crucially, Huvelin insists, the division of labour does not produce sympathy and so cannot give rise to solidarity. The exchange of services leads rather to the effort to exploit others and dominate them.

Here then is the fundamental divergence from Durkheim. Durkheim notes that the division of labour can produce solidarity only if it is not forced (as in a master-slave relationship). But where, asks Huvelin, can we find authentic, voluntary specialisation or fully free vocations? 'One sees the birth and growth of originality, heresies, the spirit of invention, sectarianism. Sympathy born of similarity sees its scope curtailed by increasing differentiation. Antagonisms multiply' (1923:139). In such conditions, interdependence exists but specialisation creates an unstable environment, where reactions of antipathy may be dangerously unpredictable. So it is appropriate, in the context of a highly developed division of labour, to speak of *organic interdependence* but not organic solidarity.

In these conditions, according to Huvelin, law has precisely the powerful, directive role that Durkheim's sociology seems reluctant to accord it. Order is maintained in conditions of organic interdependence by two essential forces. The first is 'organised social constraint' (law), which requires a sovereign power to impose peace by means of a specialised force (ibid.: 141). As regards contracts, Huvelin denies that contractual relations create or express solidarity between the parties, who are likely to be concerned only with their own individual benefits. Law provides enforcement and 'a good number' of parties fulfil their contracts not through sympathy but fear (ibid.:142).

The other force maintaining the always precarious order of organic interdependence is that of common sensibilities or outlooks (*des états d'âme communs*) (ibid.). Interdependence can produce feelings of sympathy among individuals who exchange services in similar conditions. Similarity of situation and proximity may create spontaneous solidarity (perhaps Huvelin is thinking particularly of solidarity of classes, occupations or professions). In particular, common ideas and convictions can develop, even in conditions of elaborate division of labour. Some of these take on a 'religious veneer' as notions of justice, probity and honour (ibid.) and enter into law in various ways.

Indeed, law alone is not powerful enough to control the potential anarchy of the increasing division of labour. The 'religious imperatives' of justice, probity and honour, produced and strengthened in the enclaves of spontaneous solidarity in modern life, are necessary to support legal imperatives. Without them law would fail. It is vital to understand that law without moral support is 'almost nothing' (1923:143). Both moral and legal elements of order in modern society are indispensable. But the balance of attraction and constraint varies with the nature, history and conditions of social groups, and the direct roles of law and morals are inversely proportional: one compensates for the lack of the other. Huvelin calls this the 'law' of legal-moral compensations (*loi des compensations juridico-morales*) (ibid.).

Conclusion: Durkheim and Huvelin

Finally, therefore, Huvelin strongly affirms what is perhaps the central point to be gathered from Durkheim's legal theory as a whole: that law is inseparable from morality and that its function is to express and support this morality, which is the normative framework of solidarity in modern societies no less than earlier or simpler ones. But he departs from Durkheim in interesting ways. He wants to use a Durkheimian framework but (i) to avoid what he plainly sees as Durkheim's complacency about the nature and possibility of social solidarity in complex societies and (ii) to portray law as having a much more active role in fostering social cohesion than Durkheim explicitly recognises.

Reviewing 'Les cohésions humaines' in the *Année sociologique*, Mauss noted clear differences from Durkheim's positions but was sure that Huvelin's text would have interested Durkheim. Praising it warmly, he saw its framework as allowing interesting comparisons of societies in terms of their aptitude for organisation and spontaneous sociability (Mauss 1925b:27). And he thought that, had it been completed, Huvelin's book would have been an important contribution on the question of the state (Mauss 1931:12).

Yet comparison with Durkheim's positions shows the problematic features of Huvelin's ideas. In *The Division of Labour*, Durkheim treats the content and authority of law as given by the structural development of society. Law is tied to morality and expresses the conditions of solidarity. In this perspective, law is the moral structure of society expressed through particular organisational forms. In Durkheim's later work law is no longer discussed in terms of direct links between types of law and types of solidarity. Instead, the content of law (in modern and pre-modern societies alike) is considered in terms of the value system of the collective consciousness. In modern complex societies this value system is that of moral individualism. Law is thus a public expression of society's foundational values and central (officially promulgated) belief system.

By contrast, for Huvelin, law is influenced by morals but not derived from either the logic of the division of labour (creating the structural conditions of organic solidarity) or from popular morality. Law's function is not expressive but *corrective* of the sociologically 'normal' social order (which in complex modern societies is potentially one of chaos and disorder). Huvelin thus portrays law as a political force, somehow external to social life, that is available to control the natural tendencies of societal development, which are *away* from solidarity.

Huvelin, therefore, needs an 'independent' explanation—that is, an explanation outside the terms of the logic of Durkheim's sociology—of where law originates and gains its directive, controlling character. In 'Les cohésions humaines' he offers no such explanation. The earlier essay on magic and individual rights suggests, consistently with Durkheimian sociology, that law's origins are in the collective consciousness of early societal development, dominated by religion. Magic is the social phenomenon that eventually 'frees' law for future pragmatic development as a regulatory technique. Religion and magic thus provide the resources to support the development of legal ideas and institutions. Nevertheless, Huvelin's thesis does not actually explain the sociological origins of law, but rather the social phenomena that created conditions conducive to its emergence and development. Again, 'Les cohésions humaines' only suggests sociological reasons that make law necessary and give it its tasks. A sociological explanation of how law arises and develops is still missing.

Huvelin's effort to explain law's independent effectiveness and power is therefore unconvincing. Within the framework of Durkheimian explanation, law remains a cultural reflection and expression, rather than a sociologically intelligible instrument of societal guidance or control. This is not, however, to suggest that a Durkheimian view of law is unfruitful: far from it, because Durkheim's emphasis may be very important in highlighting law's interrelation with culture in many forms. It also properly insists on the significance of moral components in legal thought, practices and institutions, and in guaranteeing law's ultimate authority and defining its social functions.

But it is precisely what Paul Huvelin found missing in Durkheim's legal theory—an explanation of law's connections to power and politics in their historical settings—that later critics have almost always seen as its central problem. Mauss (1925a:497) admired Huvelin's 'taste for the practical and taste for ideas while being a master of legal dialectics' and he always saw the jurist as fully part of the Durkheim group. But the primary interest of Huvelin's work today lies in the fact that he tried, sympathetically and thoughtfully, to solve the fundamental problem of the place of power and politics in Durkheim's legal thinking and so to save the 'master' from himself.

Notes

1. The phrase is that of one of his followers, the jurist Emmanuel Lévy (1933:14, 35).
2. For detailed discussion of these and related matters see Cotterrell (1999).
3. See the effusive praise of Lévy in Mauss (1926). As regards Huvelin, Durkheim thought his ideas made him 'very close to us' and lost no time in enlisting his help for the *Année*. See Durkheim (1998a:319), and also his letter (1979:115) in support of Huvelin's Paris chair candidature in 1907.
4. On Lévy, see the symposium in *Droit et Société*, nos 56-57, 2004, the documentation in *Jean Jaurés cahiers trimestriels*, no 156, 2000, and Frobert (1997). On Huvelin, see the documentation in *Revue d'histoire des sciences humaines*, no 2001, and Audren (2001).
5. It is significant that both Lévy and Huvelin were far more active in practical politics than Durkheim, though in Huvelin's case this activity was a late phase in his life and short-lived because of his early death.
6. Huvelin 1907:3. Cf. Durkheim's essential distinction: religion centres on a church, magic does not (1912a:58-65/t.42-47). Cf. Mauss and Hubert (1904:16/t.30).

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