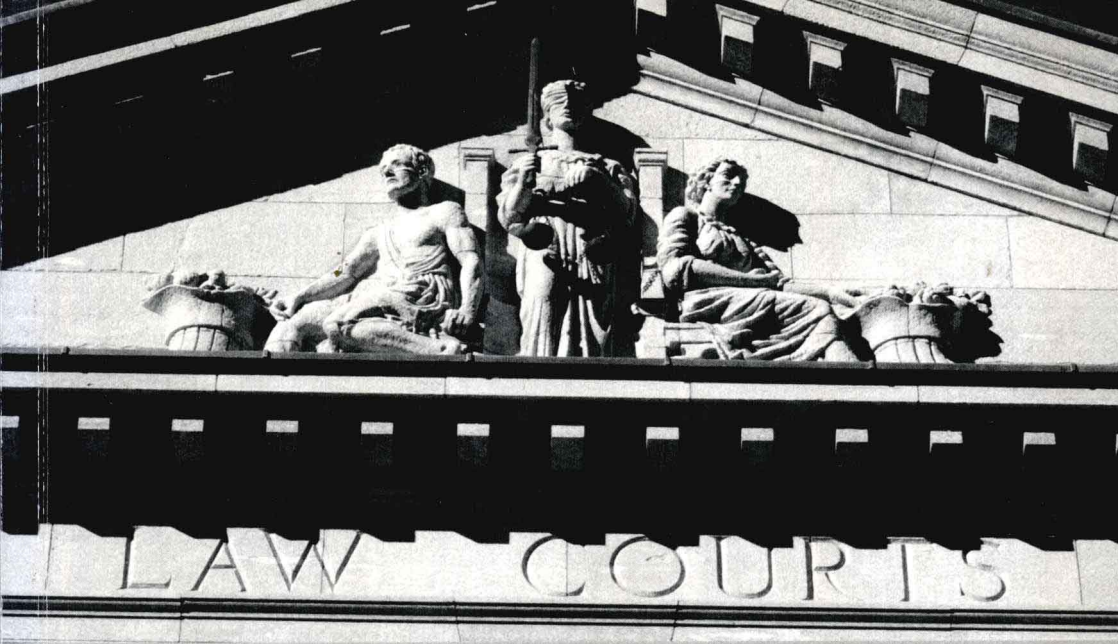

Salif Nimaga

Émile Durkheim and International Criminal Law

A Sociological Exploration

VDM
Verlag
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Impressum/Imprint (nur für Deutschland/ only for Germany)
Bibliografische Information der Deutschen Nationalbibliothek: Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Coverbild: www.ingimage.com

Verlag: VDM Verlag Dr. Müller Aktiengesellschaft & Co. KG
Dudweiler Landstr. 99, 66123 Saarbrücken, Deutschland
Telefon +49 681 9100-698, Telefax +49 681 9100-988
Email: info@vdm-verlag.de

Herstellung in Deutschland:
Schaltungsdienst Lange o.H.G., Berlin
Books on Demand GmbH, Norderstedt
Reha GmbH, Saarbrücken
Amazon Distribution GmbH, Leipzig
ISBN: 978-3-639-26793-8

Imprint (only for USA, GB)
Bibliographic information published by the Deutsche Nationalbibliothek: The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.d-nb.de.

Cover image: www.ingimage.com

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Printed in the U.K. by (see last page)
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ISBN: 978-3-639-26793-8

Contents

1. Introduction

Émile Durkheim might have heard of the efforts of France, Great Britain and Russia starting in 1915 to prosecute the leaders of the Ottoman Empire for 'crimes of Turkey against humanity and civilization' committed in the course of the Armenian genocide.[1] But this project turned out to be a failure shortly after his death in 1917. The equally unsuccessful attempts to prosecute German war criminals, including the *Kaiser* on the basis of the Treaty of Versailles[2] show that a functioning system of international criminal law simply did not exist at the time. When the first accomplishments in international criminal law were achieved in the context of the Trial against the Major War Criminals before the International Military Tribunal in Nuremberg, Durkheim had already been dead for more than a quarter of a century.

To analyse international criminal law within the theoretical framework of one single author, especially one who did not live to observe the emergence of international criminal justice, is problematic. There is a strong appeal emanating from such complex approaches, which is based on the hope to provide a context for otherwise unrelated debates. However, the dignity that the reference to thinkers perceived as classics[3] provides does not make the justification for such a choice superfluous.

Especially normative arguments resulting from the application of one such scheme are exposed to criticism. The conclusion that aspects of international criminal law are not reconcilable with Kantian philosophy, for example, raises the legitimate question why this should be a problem.[4] The choice of a Durkheimian perspective shall only be judged by the explanatory surplus it provides. The benefits resulting from such an investigation can

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[1] On the Armenian genocide see Lewy (2005). The efforts for international prosecution of these crimes are documented by Bass (2000: 106 ff.).

[2] International trials did not take place. On the tokenistic national efforts in Leipzig, see Hankel (2003) and Wiggenhorn (2005).

[3] It is safe to count Durkheim among the classics of sociology since Parsons (1937). Breathnach (2002) and Müller-Tuckfeld (1998) are the most recent publications devoted to Durkheim's theory of criminal law. Cotterrell (1999) provides the best elaboration on Durkheim's legal sociology, while Lukes (1973) represents still the authoritative general resource. Where possible all the references to Durkheim's writings use Lukes' dating enumeration with the first number relating to the year of publication of the (French) original and the second number relating to the English translation: É. Durkheim, *The Division of Labor in Society* (New York: Macmillan, 1933), G. Simpson's translation of the original *De la Division du Travail Social* from 1893 is referred to as 1893b/1933b. Further, in the text there will often appear short titles of Durkheim's major works, e.g. *The Rules* instead of *The Rules of Sociological Method.*

[4] Particularly the work of Immanuel Kant has recently attracted several scholars as the foundation of an analysis of the international criminal justice system, see Gierhake (2005) and Köhler (2003).

be grouped at least according to four types: The first group remains at the exegetical level and here we find that the challenges arising in the analysis of international criminal law lead to the specification of some of the key concepts in Durkheim's sociology as well as a determination of the relation between them. The second set of results stems from analysing elements that explicitly or implicitly restrict Durkheim's sociology to the context of nation-state societies and in detecting tendencies in his work that allow for surpassing this national focus. Further, studying norms of international criminal law from a Durkheimian perspective can either take a direct or an indirect approach. While the former consists in a sociological interpretation of the content of these rules, the latter is based on Durkheim's famous distinction between mechanical and organic solidarity. To study these moral phenomena is possible due to law's index quality, with different types of legal norms pointing towards different forms of solidarity. The interest in international criminal law from this perspective is secondary, as it is merely studied in order to reach conclusions regarding social formation processes at the international level based on mechanical solidarity.

The following investigation grew out of the perception that interdisciplinary research in the field of international criminal law is still very much in its developing phase and was informed by attention to and respect for the sociological tradition. The exploration of Durkheimian sociology in the interpretation of international criminal justice does not aim to be exclusive. It is a mere stone in an emerging mosaic of theoretical approaches to international criminal law in order to allow for a more comprehensive understanding of this area of law.

The focus of this book will be on the direct and indirect analysis of rules of international criminal law and its application by international tribunals. The theoretical background for these analyses will be provided in the first part focusing on the relevant elements in Durkheim's theory of criminal law. Aimed at being concise, a certain degree of precision is, however, unavoidable. The necessity for such a precise reconstruction of Durkheim's sociology is highlighted by the comparison to Osiel's study who uses Durkheim's understanding of criminal law to comment on the role of tribunals in the aftermath of gross human rights violations.[5] Yet, his understanding of Durkheim's fundamental concept of the *con-*

[5] Osiel (1997) is the only book that relies primarily on a Durkheimian framework in the analysis of acts that can be considered as international crimes. In his focus on the trials against the Argentinean Junta the specifics of the international context sometimes become sidetracked. The argumentation in Henham (2005) builds on Durkheimian sociology in many regards. From a sociological per-

science collective[6] differs considerably from the one that will be developed here, as he approximates it to that of collective memory. His book thus circles around the question how collective memory is shaped through criminal trials as a response to "mass atrocities."[7]

The analysis of international phenomena forces us to rethink some elements of Durkheim's theory. An approximation to the theoretical exploration presented here we find – although in negative form – in studies that deal with the questions of nation and nationalism in the writings of Durkheim that not only conclude that he cannot be regarded as a nationalist but also that his theory is not inevitably restricted to the framework of the nation-state. These studies, however, do not develop a positive version of the theoretical adjustments necessary to facilitate the transfer from the national to the international level.[8] Two of the trajectories along which a Durkheimian theory capable of grasping processes of internationalisation can be realised will be presented in section 3. In this sense the third chapter functions as a bridge. It is devoted to the description of the bias toward the national society inherent in Durkheim's writings and how this bias can be overcome by developing traits already inherent in his work. In order to make his theoretical insights applicable to phenomena no longer contained within the nation-state, processes leading to internationalisation will be analysed to tentatively formulate a Durkheimian approach to the study of globalisation. The focus on international criminal law will lead to an unusual perspective, as usually observations concerning the international division of labour dominate these discussions.

Section 4, finally, contains an exploration of the interpretative potential of a Durkheimian approach to the provisions of international criminal law. Whereas the second and the third chapter deal with the question what the existence of the normative system of international

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spective Pickering (2003) approaches the topic of persecution. At a much smaller scale, Wise (2000) also includes explicit references to Durkheim.

[6] Already Parsons (1937: 309, fn. 3) pointed to the ambiguity of the French word *conscience* and the interpretative bias that choosing a translation with a more psychological (consciousness) or a more ethical connotation (conscience) implies. Therefore, I will follow the common practice to leave the word untranslated.

[7] Different from Osiel (1997), the following analysis relies heavily on primary sources, with *The Division of Labour* being certainly the most exhaustively discussed. Numerous quotes from Durkheim's writings will serve as an introduction for the reader unfamiliar with his work and will amount to a collection of the parts of his large work most relevant for the analysis of international criminal law. Recently, there has been renewed interest in Durkheim's work. Stedman Jones (2001) deserves particular mention for the reconstruction of Kant's influence on Durkheim mediated through French philosopher Charles Renouvier. Here we find the basis for an understanding of the *conscience collective*, which differs substantially from the equation to the concept of collective memory as featured in the Osiel's analysis.

[8] See Llobera (1994).

criminal law entails, thus examining Durkheim's proposal of the index quality of law, and are therefore mainly interested in these rules indirectly, the fourth chapter is using the Durkheimian theoretical framework to discuss specific elements of substantive and procedural law as well as institutional aspects.

The temporal scope of the discussion of international criminal law will be limited to international criminal tribunals within the period from 1945 until the present. Although it is true that failed attempts of criminal prosecution at an international level might be equally revealing,[9] there will only be brief glances at the time preceding World War II. Thus, we will start with the first serious and successful efforts to prosecute perpetrators of grave human rights violations on an international level in the form of the International Military Tribunal for the trial of German major war criminals at Nuremberg (IMT established in 1945) which was followed shortly afterwards by the proceedings of the International Military Tribunal for the Far East at Tokyo (IMTFE; in 1946).[10] Since then, the International Criminal Courts for the Former Yugoslavia (ICTY; in 1993) and Rwanda (ICTR; in 1994) were established. The last step of this development was the creation of a (permanent) International Criminal Court (ICC) with the acceptance of the Statute of the International Criminal Court at a Diplomatic Conference held in Rome on 17 July 1998 (Rome Statute or ICC Statute), which entered into force on 1 July 2002. The creation of this court is regarded as "perhaps the most innovative and exciting development in international law since the creation of the United Nations".[11] With the focus on *international* criminal tribunals, I have also decided to leave out national proceedings for example in the prosecution of national-socialist crimes in post-war Germany, the Eichmann trial, the case against the Argentinean Junta etc. This also excludes the so-called *hybrid* courts that are joint ventures between the international community and national courts that were established for example in Sierra Leone, East Timor and Cambodia.[12] Because of the focus on international *criminal tribunals* there will also be no discussion of various forms of truth commissions or 'people's tribunals'.[13]

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[9] Bass (2000: 5).

[10] There has been a further distinction between international and multi-national tribunals (Goldstone 2001: 113). Here, however, the IMT and the IMTFE – multi-national according to this distinction – shall be included in the analysis.

[11] Schabas (2001: 20).

[12] See Cockayne (2005).

[13] On the latter, see Beigbeder (1999: ch. 7).

2. Crimes in Durkheim's Theory

A crime, as defined by Durkheim in *The Division of Labour*, is an act that "offends strong and definite states of the *conscience collective*."[14] The result of this act is a passionate reaction that occurs in the form of regular punishment to repress such an offensive act and it is from this repressive sanction that we can discern the crime.[15] Punishment is thus the element which, though varying widely in its intensity, is common to all crimes: "In other words," Durkheim writes, "we must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it."[16] Durkheim makes clear that the function of such a definition is not to express the "essence of reality", here the nature of crimes, but to set a number of phenomena aside for subsequent analysis according to external, observable criteria.[17] This definition and the connection between crime and punishment remain a constant feature in Durkheim's work.[18] First, there will be an approach to the central concept of Durkheim's theory of criminal law, the *conscience collective*, followed by an exploration of his understanding of punishment. Finally, his account of the evolution of crimes will be presented.

2.1. The Concept of the *Conscience Collective*

In *The Division of Labour* we find the following definition: "The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the *collective* or *common conscience*."[19] "There are in us two consciences: one contains states which are personal to each of us and which characterise us, while the states which comprehend the other are common to all society."[20] This is the distinction between the individual and the collective *conscience*. In a person, "one and the same organic substratum", we find therefore all that is individual and unique in the person as well as a manifestation of aspects of the collectivity, which, due to the fact that its enormity surpasses the individual, will only be partially realised within the individual.[21] Further it is important to note that although Durkheim spoke of *the conscience collective* this

[14] 1893b/1933b: 80.
[15] 1895a/1982a: 79.
[16] 1893b/1933b: 81.
[17] 1895a/1982a: 80–81.
[18] 1901a(i)/1992: 39.
[19] 1893b/1933b: 79.
[20] Ibid.: 105.
[21] Ibid.: 106. See also 1895a/1982a: 100, for the aspect of incomplete realisation of the collectivity within the individual.

was merely a matter of simplification. We should think in the plural, and assume a multitude of *consciences collectives* because of the variety of social groups of which the individual is a member.[22] And yet it is the assumption underlying the argumentation of *The Division of Labour* that these *consciences collectives* in a given society will be more similar to one another in comparison to those of another society, especially if we take in consideration the large historical span that Durkheim covered in his analysis. Often it will be these similarities that one refers to when speaking of one *conscience collective* in a given society.

Durkheim is not the originator of the concept of the *conscience collective*; Albert Schaeffle and Alfred Espinas employed it before.[23] However, it is in his book *The Division of Labour* that it received an unparalleled prominence and has ever since been controversial. Although it does not appear as frequently in his writings afterwards, we will see that the claims that he abandoned the concept in later writings are not justified.[24]

In recognition of the importance the concept of the *conscience collective* assumes in the whole of the argumentation in *The Division of Labour*, a sketch of its place in this argumentation shall be presented at the beginning, followed by the clarification of some issues surrounding the tribunal. The final introduction of the philosophical background will indicate the role the *conscience collective* can play in the analysis of criminal law.

2.1.1. The Place of the *Conscience Collective* in *The Division of Labour*

The central question in *The Division of Labour* is to identify what holds a society together; especially, how the increase in autonomy of the individual allows at the same time for social solidarity.[25] Durkheim's answer to these questions is based on the distinction between mechanical and organic solidarity. Mechanical solidarity is dominant in societies characterised by the likeness of their members – in social, religious, economic, cultural terms – and the comparatively large share of the *conscience collective* in relation to the individual *conscience*, which can be retraced to similar experiences due to a low degree of division of labour. Predominant organic solidarity, on the contrary, is found in societies with a high degree of division of labour leading to considerable variance in individual experiences, and thus to the reduction of the base for a *conscience collective* and to the extension of the individual *conscience*.[26] In other words, it is the *conscience collective* that assures the integration in societies where predominantly mechanical solidarity is found and it is the division

[22] 1893b/1933b: 105, fn. 44. See also 1906b/1953b: 40.
[23] Stedman Jones (2001: 83).
[24] Lukes (1973: 5).
[25] 1893b/1933b: 37.
[26] Ibid.: 129–32.

of labour that continually takes over this function. The societies that for Durkheim come closest to the ideal-typical description of mechanical and organic solidarity are on the one hand segmentary societies and on the other hand the European societies of his time.

The socio-legal relevance of this approach stems from the fact that Durkheim states that solidarity, a moral phenomenon, cannot be observed and thus not be measured directly. However, this 'internal fact' can be studied using an 'external index' and this index is the law.[27] At the centre of Durkheim's argumentation rests thus a correspondence between legal norms and moral phenomena, especially solidarity. For him law is merely a subcategory of morality, a form of morality that is more precise and more stable.[28] This does not mean that law and solidarity are congruent. However, in legal norms we will find a reflection – smaller yet proportional – of solidarity:[29] Smaller because there always are moral norms contributing to solidarity which do not find a legal expression, yet proportional because these non-legal moral norms accompany legal moral norms of all types in the same way.[30]

Law and morality have to be considered as sets of rules the violation of which is sanctioned. The distinction is that violations of merely moral rules are sanctioned "diffusely" whereas violations of legal rules are sanctioned in an "organised" fashion, which refers mainly to the existence of a sanctioning apparatus.[31] This organised sanction can be repressive (i.e. "suffering, or at least a loss, inflicted on the agent") or restitutive (i.e. "the return of things as they were, in the reestablishment of troubled relations to their normal state"). Criminal or penal law contributes the bulk of repressive law and restitutive law is made up mainly of civil, commercial, procedural, administrative and constitutional law, excluding norms of a penal character contained in these areas of law.

Finally, Durkheim constructs the correspondence between the two forms of solidarity mentioned above and links them with these two types of law: repressive law becomes the index for mechanical solidarity and restitutive law the index for organic solidarity. We thus get the following oppositions:

Mechanical solidarity	Organic solidarity
Conscience collective	Division of labour
Repressive law	Restitutive law

[27] Ibid.: 64.
[28] Ibid.: 65.
[29] Ibid.: 64.
[30] Ibid.: 109.
[31] Ibid.: 69. The following quotes are all from the same page; emphasis omitted.

As this is an ideal-typical distinction, in reality we will always find a mixture of both, mechanical and organic solidarity, at work in the integration of a society. Durkheim further claims that we can detect a development from a predominant integration through mechanical solidarity to one that predominantly is based on organic solidarity.[32] Methodologically, Durkheim undertakes an analysis of legal codes as an 'experimental' verification of his assumption of this change.[33] He makes use of the fact that the degree of the division of labour is also an observable fact, and thus he is able to prove his assumption because he finds an increase in the division of labour correlated to an increase in the share of restitutive law in relation to the whole of legal norms.[34] A "double development" can be observed,[35] which reveals the aptness of law to serve as an index and shows the overall importance law plays in his approach. One might question the precision with which variations in solidarity can be established through the analysis of law,[36] but as an ideal-typical distinction the explanatory value is necessarily stronger with regard to the extreme than to the hybrid cases.

To further approach the topic of our investigation let us concentrate now exclusively on the link between repressive law, *conscience collective* and mechanical solidarity. Let us briefly recall the starting point: a crime is a violation of the *conscience collective* that will cause a passionate reaction in all members of a society who organise this reaction in form of legal punishment. We are therefore concerned with the relationship between the passionate reaction at the level of society and the organised reaction as punishment. From a Durkheimian perspective, the most problematic constellation occurs when organised punishment is not accompanied by a passionate reaction at the level of society. This calls into question Durkheim's entire methodological approach, as it asks how he can use repressive law in different legal codes as an index without knowing whether these rules were enforced in the form of organised punishment, and if they were, whether this enforcement was really an expression of a collective sentiment. This problem is aggravated by his remarks that the sentiments and beliefs of the *conscience collective* are "common to average citizens"[37] and that they are "found in all consciences."[38] Applied to the context of international criminal law, this raises the question whether one can talk about elements of me-

[32] This evolutional thesis has been heatedly debated, see Schwartz and Miller (1964), Baxi (1974) and Schwartz (1974).
[33] Ibid.: 133.
[34] Ibid.: 138 ff.
[35] Ibid.: 145.
[36] Merton (1965: 111–12).
[37] 1893b/1933b: 79.
[38] Ibid.: 102.

chanical solidarity in a global society just because there is a body of provisions of international criminal law that is enforced by institutions such as the ICTY and ICTR, as well as the ICC. In this regard it is not enough simply to content with Durkheim's statement that a criminal norm that prohibits an act, which does no longer provoke the specific passionate reaction characteristic to punishment is abnormal and unlikely to endure.[39] Turning to the institution of the tribunal and Durkheim's conception of it will aid understanding of how he establishes a link between organised punishment and the *conscience collective*.

2.1.1.1. The Relation between Sanction and Passion I: The Tribunal

As already mentioned, it is the organisation of punishment that marks the difference between moral and repressive legal norms. Which form does this organisation of punishment take? According to Durkheim, it can be a designated group of specialists who form a sanctioning apparatus; in small societies, e. g. a city state it might, however, be the whole population. But in either case it is important that the sanctioning apparatus appears as a constituted body charged specifically with the task of punishing.[40] The concept of the tribunal is therefore used in the widest sense but it is of utmost importance to realise that it acts on behalf of the society as a whole. Punishment is characterised by the fact that it is social. This organisation does not have to be political in the first place, in the sense that it is directed towards government. It might remain at the level of organisation in order to sanction by or on behalf of society as a whole.[41] This requires that the tribunal does not intervene merely as a third-party arbitrator; rather it must apply society's most important moral rules (i.e. legal rules) and the effects resulting from this application, in the case of criminal law the punishment of the offender, are a mere by-product compared to the reassertion of the moral foundations of society.[42] Therefore, private vengeance is kept outside the realm of the moral and legal sphere. As Durkheim states regarding the *vendetta*: "If this sort of intermediate sanction is in part a private thing, in the same degree it is not a punishment. The penal character is less pronounced as the social character is more effaced, and inversely."[43] With regard to the relationship between the organisation of punishment and the sentiments at the level of society, Durkheim emphasizes that the sentiments do not cease to be collective merely because the punishment is delegated to a specific group:[44]

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[39] Ibid.: 74.
[40] 1893b/1933b: 96.
[41] Cotterrell (1999: 61, 86).
[42] Ibid.: 87.
[43] 1893b/1933b: 94.
[44] Ibid.: 75.

> As for the social character of this reaction, it comes from the social nature of the offended sentiments. Because they are found in all consciences, the infraction committed arouses in those who have evidence of it or who learn of its existence the same indignation. Everybody is attacked; consequently everybody opposes the attack. Not only is the reaction general, but it is collective, which is not the same thing. It is not produced isolatedly in each one, but with a totality and a unity, nevertheless variable, according to the case.[45]

This description seems to fit a face-to-face community very well; however, one must ask whether it adequately describes contemporary societies. In these societies the group of those who "evidence" the violation of a rule or "who learn of its existence" is proportionally decreasing. A shoplifting-case in a different part of the country, for example, will most likely not come to our attention. Actual indignation is thus replaced by hypothetical indignation.[46] If we consider the growing size of societies with the increasing division of labour, we can see that the courts acquire a position that might be still in keeping with Durkheim's general conception of the tribunal but in which some elements have radically shifted. This specialised sanctioning apparatus performs the declaration of indignation in the form of punishment almost exclusively. Yet, except for some spectacular cases this happens generally without any public attention. Durkheim saw the role of tribunals as "authorized interpreters of collective sentiments";[47] in contrast, it seems that we have reached a state where we come to know the content of the *conscience collective* only through the practice of the courts. This leads to a methodological critique because Durkheim exclusively studies legal codes and does not take into account court decisions. Furthermore, *mis*interpretation by the courts does not exist for Durkheim, at least not as a permanent condition and he tends to level differences within the judicial system, from dissenting votes to contradicting court decisions within or across instances.[48] Therefore there is apparently a danger of attributing the indignation professionally voiced by a select few to the population at large even though that population might simply be indifferent or even have contrary sentiments. However, and this is Durkheim's main point in this regard, it is

[45] Ibid.: 102.

[46] The media and the development in the means of communication are the most important factors in making the occurrence of the crime known and putting the sanctioning process as a whole on a broader social basis. Unfortunately, these factors are not adequately addressed in Durkheim's theory. Factors to be considered regarding the media in a globalised world are presented by McMillin (2007).

[47] 1893b/1933b: 77.

[48] Osiel (1997: 33).