The Twelve Tables

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Tarquinius Suberbus was the last king in ancient Rome and 'brutality was his nature' (Livy, 1.54). After his exile, in 510 BC, began 'the history in peace and war of a free nation, governed by annually elected officers of state and subject not to the caprice of individual men, but to the overriding authority of law' (Livy, 2.1). And indeed, after sixty years, in circa 450 BC, a body of laws called the Twelve Tables was 'engraved on bronze and permanently exhibited in a place where all could read them' (Livy, 3.58). This presentation concentrates on some pieces in this body, as they have been passed down to our own time by tradition, perhaps through incalculable metamorphoses.

Maria Drakopoulou has given a brilliant account not only of the above-mentioned events in Roman history (Drakopoulou 2005) but also of the social scientific uses of law in general from the feminist point of view (Drakopoulou 2000). On my reading, the latter account consists, among other things, of delineating three historical phases. In the first phase, the law was considered as something telling about the *right* order of society, of what ought to be. In the second phase, the law could be taken as evidence for what was *wrong* in society, and thereby enabled social criticism. In the last phase, the law, writ large, was deemed as not only capable of revealing the society before us but as participating in the production and transformation of it. Drakopoulou is most interested in the middle phase, during which the underpinnings of the feminist study of law could be situated: the law as means of extracting critical knowledge from society.

The following experiment on the Twelve Tables is inspired by Drakopoulou but does not in any way purport to be in line with her thinking. The purpose of my experiment is to play a little with legal materials, thereby showing how these materials may reconstruct a (picture of) society before us. The law is taken as a scheme of interpretation and as a source of knowledge of society. Furthermore, let us agree that there is nothing in society that is independent of the people who live in it and thereby socially construct it. Consequently, I find myself justified in proposing that law, as a scheme of interpretation and source of knowledge, is also a kind of ontological field within which society is situated, a field wherein society not only appears, but that from which it also emerges. Approached like this, the law would not be deemed as an ideological smokescreen on the surface level *(Überbau)* that should be penetrated in

order to reach the real things below the surface *(Unterbau)*, which is the way a lot of earlier social theory has looked at the law and, in doing so, has bypassed it.

The history of Rome plays a role here too. Not, however, as the subject matter of my study, but as part of my demonstration. Namely, I found it more effective to play with historical rather than present-day material to argue my case. I assumed that it is easier for the reader to grasp the idea that knowledge is always reconstructed upon some definite sources when talking about historical knowledge. I believe that historical knowledge is intuitively conceived as hypothetical and relative, as always giving only a partial picture that leaves room for other possibilities. Be that as it may, my experiment will not even try to reconstruct the actual historical Rome. 'Republican Rome' is a fictitious social setting that arises from the imagery of the present writer, and this imagery is part and parcel of the whole experiment.

Gaining knowledge of the present-day is different in nature, due to the abundance of sources that are available to us all the time. My proposition is, however, that knowledge of the present-day relies on definite sources in a way similar to that of history. This is not the intuitive sense of our condition in this world, dependent primarily on the fact that we live in it, and only secondarily on the fact that we observe and try to reconstruct it. The time of our experience, so to speak, goes through us as continuously as we go continuously through it. To know is to make a break in this continuum, and this can be done by isolating some observable sources to be examined from the otherwise continuous stream of events. The law, or rather the legal materials, is one among many types of such sources.

I cannot help but make one further general note before proceeding to the actual experiment. If the present-day legal material would give us a picture of society that is contrary to our experience, then the enterprise of looking at them will have succeeded. Its success is not in showing that the law is mistaken, but quite the contrary, it is in making us conscious of the possibility that we ourselves live in a mistaken reality. Indeed, as legal scholars know, legal materials are full of surprises.

I shall start by discussing two sets of norms included in the Twelve Tables, as they are interpreted and reconstructed in one of the many versions available today.[1] The

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[1] I have deliberately used a text reproduced in the internet, namely, in the Ancient History Sourcebook (http://www.fordham.edu/halsall/ancient/12tables.html). Its editor informs us that his own source is the Oliver J. Thatcher, ed., The Library of Original Sources (Milwaukee: University Research Extension Co., 1901), Vol. III: The Roman World, pp. 9-11. The text I use gives a considerably different presentation of Twelve Tables from, for example, the critical text in M. H. Crawford (ed.): Roman Statutes I-II (1996) , II, p. 578-583. The latter is, certainly, more reliable for the one whose interest, unlike mine, lies in Roman

first set concerns women and the second prescribes the legal consequences for incurring damage to property. I shall give a treatment of this legal material and briefly explain what value I see in such a treatment.

1. Women

Let me begin with quoting something that the Twelve Tables stated about women:

– The fifth table: 'Females should remain in guardianship even when they have attained their majority.' (V.1.)
– The sixth table: '*Usucapio* [the acquisition of ownership by long use or enjoyment] of movable things requires one year's possession for its completion; but *usucapio* of an estate and buildings two years.'(VI.5.) 'Any woman who does not wish to be subjected in this manner to the hand of her husband should be absent three nights in succession every year, and so interrupt the *usucapio* of each year.' (VI.6.)
– The tenth table: 'The women shall not tear their faces nor wail on account of the funeral.' (X.3.)

These regulations give us a small window on a limited aspect of life in Rome at the time. The picture presented by legal norms is far from complete, as a matter of course, and certainly a much fuller one could be gained from other sources, written or otherwise (literature, pottery, archaeology, ...). But we may still ask, just for the purposes of experiment, what kind of picture this particular and isolated source is capable of evoking for us.

One aspect of the life of a woman is her *legal status* and certain features of that status in early republican Rome were stated in the given sections of the Tables. First, we may conjecture that women were to be under guardianship of a kind similar to that of minors. What guardianship entails we cannot know by virtue of the limitations of our particular source here; nevertheless, we could make some reasonable guesses. Second conjecture: a woman was deemed something similar to a movable thing or a piece of real estate being that she could be owned; in brief she was or could be regarded as property. As such, she seems to be of some utterly peculiar type as it could be that she did not want to be owned and she might even have acted on her own to dissociate herself from such conditions. Again, assuming that we do not have other sources, we

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history.

may only guess what property was, in general, who could own it, and what owning meant altogether. Third, in funerals women were prohibited from showing their emotions in the specified ways.[2] This much we can conjecture about woman's legal status in Rome in 451 BC.

What about the life of men and their legal status? If restricted to these same pieces of historical data, can we make out something of their condition? We can try at least. Considering the first point, it *seems* reasonable to think that at least some of the adult men were not under guardianship. For the second point, we may similarly presume that some men were not deemed as property. And for the final point, men were free to 'tear their faces and wail' during funerals.

The legal status of women and men is undeniably one aspect of the human condition. And as long as we restrict our focus on this small quarter of life, the Twelve Tables can provide us with some 'firm ground.' However, things get complicated if we desire more. But perhaps we indeed wish to know, not only about Roman law, but more about life in Rome. Perhaps we need to establish the desired broader knowledge too on the given limited literary sources that happen to be legal norms. The fundamental problem in such an enterprise is the special kind of *counterfactuality* of legal norms, such as those concerning women in the Twelve Tables. On the one hand, it may very well be that the law in a given subject only declares what the customs have already established. In that case the law is more or less identical to the prevailing social factuality (hereinafter, 'the fact'), in which case the law tells us about the fact. The result would be the same, i.e. the identity of the law with the fact, if people were extremely or sufficiently law-abiding.[3] On the other hand, in some cases at least, it is legitimate to presume that laws are given to human beings precisely because they tend to act otherwise. This notion is important although self-evident. One might simply ask what other sense there could be in the entire business of legislation. Hence, the legal norm can be and typically is counterfactual, in which case we must be prepared to reconstruct the fact as a negation of the norm purporting to regulate it.

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[2] In Crawford's edition the text is given as follows: 'Women are not to mutilate their cheeks or hold a wake for the purposes of holding a funeral.' In Latin, '*mulieres genas ne radunto neue lessum funeris ergo habento*.'

[3] The resulting identity would, however, be a consequence of different relation of domination and determination in each of the two cases. In the first case, customs ('the fact') determine and dominate the law, whereas, in the second case, the law dominates and determines the behaviour ('the fact') of people.

That legal norms are potentially counterfactual means that they give a picture of society in a dual format, or, in the parlance of photography, in both a negative and positive version. To know which one of these two is true to the factual circumstances one needs other sources than these legal materials. The outcomes resulting from the choice can be exemplified thus:

(A) In the first assumption, according to which the law in the Twelve Tables reflects straightforwardly how the life in Rome really was, we get the following results. 'In fact,' women lived under the guardianship of someone else all their lives; they were treated as chattel and real estate, unless they wanted otherwise; they did not weep during the funerals. And regarding men, they 'in fact' lived uninfluenced by any guardianship once reaching adulthood; they were not treated as property; they wept in funerals.

(B) In the second assumption according to which the law is counterfactual, we get the diametrically opposite descriptions. Guardians tended to abandon women in their care at adulthood; women tended to act as if they were ends-in-themselves and not subservient to their husbands; women's behaviour at funerals ran unchecked. Men, in turn, were watched over by someone until the end of their lifes; men were 'things' belonging to society by nature so that no regulation to that end was needed on their part; during funerals men manfully subdued their emotions, or perhaps had no such things.

Using other resources we might be able to say in which case the law describes the fact, i.e. life as it went along, and in which case not. Political bias as well as all kinds of prejudices, feminist or chauvinist, may twist judgement, no doubt. However, what I wanted to demonstrate above all is the basic complication at hand when using legal materials in social science: a legal norm may be evidence of something but may, in equal measure, also serve as evidence to the contrary.

2. Damages

Let me now turn to another and different example of a legal norm, one that tells what is to be done if someone incurs damage to another's property:

> The eighth Table: 'Any person who destroys by burning any building or heap of corn deposited alongside a house shall be bound, scourged, and put to death by burning at the stake provided that he has committed the said misdeed with malice aforethought; but if he shall have committed it by accident, that is, by negligence, it is ordained that he repair the damage or,

> if he be too poor to be competent for such punishment, he shall receive a lighter punishment.' (VIII.10.)

Again, we are informed of the life in Rome, but in a quite different form. Such a piece of legislation is only conceivable if there was some kind of magistracy that executes it. This is so because the norm is actually addressed to this magistracy, not to the people themselves. There were houses and corn heaps alongside the houses as well as people who burned these. These people, however, were left intact by the norm. This norm did not speak to them. Instead, the engraving in this Table informed the alleged magistracy of the correct treatment intended for those who burned houses and corn heaps.

This ancient piece of legal material reveals to us (makes us believe) that there was a legal order that functioned in a specific way and structured the social environment in which the Romans lived. The specific way of functioning was that sanctions were imputed (*zurechnen* as Hans Kelsen notes) to certain facts, which meant that individuals were regarded as accountable and made response for the things that happened. If someone maliciously burned property, that someone was himself burned at the stake. That the first fact of burning was followed by the second fact of burning did not occur by virtue of some natural necessity, but because of the legal ought that prescribed an obligation to the executioners of the legal order. A legal order supposed to be functioning by the given logic, the logic of retribution (*Vergeltung,* as Kelsen called it), was 'obviously' part of the social reality of those living in Rome at the time.

So far so good, but it may still be that this is not all that we can know (conjecture) by way of examining this piece of legislation. Might it reveal something of a whole new dimension of the life in Rome, namely, the dimension concerning the concepts of justice that determined Roman people's thinking and judging of each others actions, i.e. the prevailing and living moral principles and social philosophy of the Roman people? Well, one should not expect too much, but doubtlessly also this one modest piece does evoke a picture, however misleading or insufficient, but a picture it remains.

What can we find if we look for justice in this picture? Firstly, we have the malicious burning of property that was sanctioned severely by burning the perpetrator at the stake. This sanction obviously represents for us the so-called *repressive justice*, and an extremely harsh one by the modern standards. Secondly, we have the incurring of damage negligently which was sanctioned by making the tortfeasor restore the damaged property. This sanction, in turn, is a clear and simple instance of the so-called *restitutive justice*. Thirdly, we have the rule of adjustment that allowed milder damages

to be stipulated for a negligent but poor tortfeasor. This fits the style of the so-called *equitable justice*.

I will not indulge here in discussing whether the Twelve Tables have determined the modern concepts of justice or, on the contrary, whether the modern concepts determine any particular reading of the Twelve Tables. It suffices to say that something conceivable to us moderns regarding justice can be abstracted out of this particular engraving. We have three concepts of justice that can be projected onto this piece of legislation, and it is a matter of scientific mentality how much we wish to reconstruct upon such projections. Someone would perhaps say that there must have been these three general moral principles that underlay the law and were expressed by it. Someone else would object that all we have here is an engraved law – if it seems to have supported at some point some of the many thinkable moral perspectives, this is fine, she says, but we cannot know about anything that truly underlies it.

Can we, leaving the concepts of justice for the moment, still get something out of the picture given in the eighth table? What more does it perhaps suggest about life in Rome? Let us try focussing our eyes, not on the sanctions prescribed, but on the so-called factual premises given in the Table, which describe and specify the variety of circumstances in which the norm is to apply. This, I propose, is what we get then: Firstly, we have someone burning property either with *malice* or with *negligence*. Secondly, we have the burning of property by a *poor* tortfeasor, and, adjoining this, by a tortfeasor sufficiently *wealthy* to recompense the losses.

In this manner the legislator of the Twelve Tables represented to himself human reality and human beings themselves. He first made up the states of the human mind in terms of graduated culpability and then laid down a social positioning in economical terms. Only thereafter could it go forward by prescribing the legal consequences. The imagery of the lawgiver established some utterly significant groundwork here. It created a stage for representing the social world before the law, a stage for the legally relevant facts that constituted a peculiar kind of reality, namely, a reality for the law (I call it simply *the legal reality*).

Were this a serious study in history, reservations regarding anachronism should be made in conceptualising reality, just as in the case of justice. Thus, for example, the meaning of malice is a modern one for me, while part of it is historically determined. What I would find really important, however, is the following. As stated, justice can be reckoned as something external to the law. Similarly, it is true that law regulates some living reality that takes place outside of it. In consequence, reality would be external to law just as justice is. Accordingly, malice, negligence, poverty and wealth should all be

regarded as external facts in a way similar to that of regarding burning houses and corn heaps.

But, as in the case of justice, the externality of these real things may be questioned by remembering that what we have here is a piece of legislation, and nothing more. Such legislation may very well make certain interpretations of man and his society, but it is still a law interpreting reality, not reality in and of itself. Accordingly, the one who looks at the law can see only the images of man and society which are produced before her eyes by that law, and not anything external to it.

Hence, according to this stricter view, malice should not be regarded as a fact factual, but rather as an attribute produced by the law. The same goes for the other facts given, negligence, poverty and wealth, and more generally, this goes for the entire legal reality. Drawing the stance somewhat further along these lines, one could also quite consistently proclaim that Roman houses and corn heaps existed by virtue of the law. This would not sound unusual at all if one holds fast to the idea that these real things are now qualified as real within the legal reality. On this soil only *legal* facts are cultivated, anything else will not germinate.

Let me now summarise the possibilities found open to the one who looks at the eighth Table and wants to know something about the life in Rome. *First*, it was established that there was a legal order that functioned by way of imputation, that is, by prescribing sanctions and executing them. *Second*, we looked at these sanctions and tried to find Romans' justice in them. Here we had two options. On the one hand, we might deem the instances of justice found as external to the law but expressed by it. On the other hand, we might deem the justice laid down before our eyes not as external to but as a product of the law in the Twelve Tables. *Third*, we were looking at the things made significant in the norm as facts leading to sanctions. Here too we had two options. On the one hand, we might deem these facts as the living Roman reality external to the law but expressed by it. On the other hand, we might deem the given Roman reality not as external to the Twelve Table but as a reality of an image produced by the Twelve Tables.

3. The legal reality

With the help of the two examples in the previous sections I hope to have illuminated the law in its relation to so-called reality. The discussion concerning the rules on women was meant to reveal the basic complexity within that relation, that is, its potential for counterfactuality. The discussion concerning the rules on damages was to map out the

various dimensions open to a researcher who chooses to study legal materials. The latter discussion also provided certain stations on the general map of legal studies among which I can situate my own approach.

The first of the stations is the legal logic of retribution according to which sanctions are imputed to preestablished facts. Fact and sanction belong to the structure of legal norms. Legal norms are executed in the legal practices. Legal practice is a kind of social practice. Social practices serve as the foundation and content of the social reality. Thus the law, as I approach it, is embedded in social reality, but it exhibits its own logic constituting the difference between it and other practices.

The next station is the problem of justice and its relation to the positive law. This is a much discussed topic that is conducted under the guise of different titles (legitimacy of law, law and morality, etc.). In this discussion legal positivism sides with moral relativism, while those who try to work out an ethical basis for the law side with moral cognitivism. What matters for me here is the point at which these branch off into different directions: One can scrutinise the law by way of measuring it against some extra-legal standard of justice (for which Gustav Radbruch has coined the term *das übergeseztliches Recht*). Alternatively, one can study the varieties of justice by examining what is stated in the legal order. Under the latter option one may want to know about the positive moralities that have prevailed in the course of time in different societies. But equally well one may decide to concentrate merely on that variety of justice whose locus is the law. One would not concern him- or herself with any other positions that this variety of justice (or some other) has or does not have.

Now, this matrix can be moved to another discussion, which is my last station, the discussion on the relationship between the law and social reality (the sociology of law, law & society, etc.). By this movement I intend to make a constructivist contribution to that discussion. Legal realism, as against constructivism, is a sociological approach that holds fast to the idea that there is a real reality in which the concept of law and everything that happens under it must be made to fit. Like in the case of extra-legal justice, the law in legal realism is also measured against something external. Legal realism explains how the law functions in society, that is to say, the effects the former has on the latter. This way, legal realism allows an instrumentalist evaluation of the law (its success in its aims, its unintended side-effects, etc.). My approach is the reverse of legal realism: it examines society in the law, not the law in society. By examining how the law 'presents a reality before itself' I try to comprehend the legal construction of social reality. Presumably each social practice creates a reality in its own image. I focus on that reality whose creator is the law.

Some social theorists have always been sensitive to such social practices that bear the dimension of ideals within them. Thus the law and its practice, as social phenomena, are easily viewed by those theorists as something like a living moral philosophy, a mediator of morality and society, the fuel for history, and so on. In this regard, the question even for the social theorist is one of the relationship between justice and positive law. This is quite uncomplicated, of course, because it is the purpose of the norm to make the malleable matter fit inside it. Precisely this is also the pursuit of legal norms: to regulate society and humans by prescribing oughts and duties.

But law regulates the society and human beings also in another way, that is, in its statements of facts.[4] Legal practice must establish a picture of human life before it starts to mould it intentionally. At first sight, it seems natural to think that the law's contribution to the construction of social reality is in the values it purports to sustain and in the interests it has decided to support. Because it is presumed in the legal practice that its images of life are real, these also come true as, and if, the law is an effective social practice. This is not of course intended by the actors to be a regulation of society, but a correct conception of it.

In brief, I do not try to reconstruct the (counterfactual) world that is hoped for in the ideals, values and goals of society, or in its conceptions of justice. Instead, I try to reconstruct that world which is imagined, presupposed, taken for granted by the law, and thereby made real. I would like to define this way of proceeding as a *reversal of the mimetic relation*. Mimetic relation is classically (see Plato's Republic, book X) thought of as a relationship between the authentic real thing and the representation that tries to imitate it. If one reverses this relation, the thing that was being held as authentic is actually made existent by representing it. Thus, the copy is not merely reproducing an original but producing an original for its own use. This is exactly what happens in social practices; society is the product of the imageries of those practices, not anything

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[4] In the opening chapter of his book *Law's Community,* Roger Cotterrell discusses how the law effectuates conceptions of society in its members. First he says that it is a 'fact that legal doctrine gives rise to systems of cognition and evaluation that help to define the way people understand the general character of the social world in which they live' (p. 7). This means, in the context of the analysis of ideology, 'that law regulates not only by coercing those who create disorder and by empowering those who sustain and reproduce order, but also by helping to fix and maintain "common sense" understandings of the nature of society and social relationships in general' (p. 8). Finally, Cotterrell's argument 'is that if law's capabilities (its limits and potential) as an agency of regulation in contemporary society are to be understood it is important to recognize that these may lie as much in providing a structure of social understandings as in ordering a system of state coercion' (p. 8).

which is real externally to them. From this standpoint, legal reality becomes an image of society produced and reproduced in the practices of law.

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