Law, Anthropology, and the Constitution of the Social

Making Persons and Things

ALAIN POTTAGE AND MARTHA MUNDY

CAMBRIDGE STUDIES IN LAW AND SOCIETY

LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL

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Edited by

Alain Pottage and Martha Mundy

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LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL

This collection of interdisciplinary essays explores how persons and things – the central elements of the social – are fabricated by legal rituals and institutions. The contributors, legal and anthropological theorists alike, focus on a set of specific institutional and ethnographic contexts, and some unexpected and thought-provoking analogies emerge from this intellectual encounter between law and anthropology. For example, contemporary anxieties about the legal status of the biotechnological body seem to resonate with the questions addressed by ancient Roman law in its treatment of dead bodies. The analogy between copyright and the transmission of intangible designs in Melanesia suddenly makes Western images of authorship seem quite unfamiliar. A comparison between law and laboratory science presents the production of legal artefacts in a new light. These studies are of particular relevance at a time when law, faced with the inventiveness of biotechnology, finds it increasingly difficult to draw the line between persons and things.

ALAIN POTTAGE is Reader in Law at the London School of Economics and Political Science. Previously he has taught in the law schools of King's College, London, and Sydney University. He has published extensively on questions of property law and legal theory.

MARTHA MUNDY is Reader in Anthropology at the London School of Economics and Political Science. She has published an ethnography, *Domestic Government: Kinship, Community and Polity in North Yemen* (1995), and edited several books, most recently, *The Transformation of Nomadic Society in the Arab East* (co-edited with B. Musallam, Cambridge, 2000) and *Law and Anthropology* (2002).

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CONTRIBUTORS

Engin Akarlı is the Joukowsky Family Distinguished Professor of Modern Middle East History at Brown University. He has taught at several universities, serves on the editorial board of Islamic Law and Society, and is the author of several publications including *Political Participation in Turkey* (1974), *Belgelerle Tanzimat* (1977), and *The Long Peace: Ottoman Lebanon, 1861–1920* (1993).

Susanne Küchler is Reader in Material Culture Studies in the Department of Anthropology, University College London. She has written on images of memory and the art of forgetting with special reference to the Pacific. Currently she is directing an ESRC funded project entitled 'Clothing the Pacific', linking University College London, the British Museum, and Goldsmiths College.

Bruno Latour is Professor in the Centre of Innovation at the École Normale Supérieure des Mines in Paris. He also holds appointments at the London School of Economics and in the Department of the History of Science at Harvard University. He is the author of many books, most of which have been translated into English, notably *We Have Never Been Modern* (1993), *Aramis or the Love of Technology* (1996), and *Pandora's Hope* (1999).

Martha Mundy is Reader in Anthropology at the London School of Economics. Earlier she taught at Yarmouk University in Jordan, Université Lyon 2 Lumière, UCLA, and the American University of Beirut. Together with Richard Saumarez Smith, she is completing a monograph on *The State of Property: Law, Administration and Production in Late Ottoman Southern Syria.*

Tim Murphy is Professor of Law at the London School of Economics. His publications include (with Simon Roberts) *Understanding Property Law* (3rd edn, 1998) and *The Oldest Social Science? Configurations of Law and Modernity* (1997). His current research is in the field of law and social theory and the history and theory of heritage.

Alain Pottage is Reader in Law at the London School of Economics. He has written on various aspects of law and social theory, with

particular reference to questions of ownership, and is currently preparing a book on biotechnology patents.

Marilyn Strathern is William Wyse Professor of Social Anthropology at the University of Cambridge. She is the author of a number of books, including *The Gender of the Gift* (1988), *After Nature* (1992), and *Property, Substance and Effect* (1999).

Yan Thomas is Chair of the Centre d'Étude des Normes Juridiques at the École des Hautes Etudes en Sciences Sociales in Paris. He is the author of several articles on Roman legal culture and legal history, as well as a number of books including *'Origine' et 'Commune Patrie': étude de droit public romain* (1996), and two forthcoming works on, respectively, legal history and the institution of paternity.

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CHAPTER ONE

INTRODUCTION: THE FABRICATION OF PERSONS AND THINGS

Alain Pottage

Each of the contributions to this book addresses the question of how legal techniques fabricate persons and things. In exploring that question, and in asking just what 'fabrication' means, each chapter focuses on a specific historical, social, or ethnographic context. Given that these contexts, and the modes of institutional or ritual action which they disclose, are quite varied, this book does not aim to provide a general theoretical account of the fabrication of persons and things in law. Indeed, the term 'fabrication' is chosen precisely because it suggests modes of action which are lodged in rich, culturally-specific, layers of texts, practices, instruments, technical devices, aesthetic forms, stylised gestures, semantic artefacts, and bodily dispositions. Each contribution shows how, in a given social, historical, or ethnographic context, elements of this repertoire are mobilised by legal techniques of personification and reification. The specific character of these modes of action would be lost in a general theory of law as an agent of 'social construction'. Yet, diverse as they may be, our approaches to the question of legal fabrication are brought together as resources for reflection upon a specific institutional predicament. In Western legal systems, persons and things are now problems rather than presuppositions. One could point to technology, and biotechnology in particular, as the main factor here, but there are other reasons for the implosion of the old legal division between persons and things. For example, those institutions which effectively 'naturalised' legal artefacts (notably, the institution of inheritance) have lost their central role in law and society. For the purposes of an introduction, the important point is that the complex

techniques which legal institutions traditionally used to fabricate persons and things no longer function silently and reliably. The legal boundary between persons and things, rather like that between nature and culture, is no longer self-evident. In many areas, legal forms have been colonised by 'ethical' (or similarly regulatory) modes of decision-making, which implicitly acknowledge the impossibility of beginning within a natural order of things. Collectively, the contributions to this volume give historical and comparative depth to reflection on this predicament.

The question of how legal institutions construct the category of the person has been asked often before. For example, a great deal of attention has been given to the statuses which Western legal systems attributed (or denied) to married women. Many of these studies imagine legal personality as the institutional clothing of a 'real' (natural, biological, or social) person; and, however critical they might be in other respects, the distinction between persons and things continues to function as an untheorised premise, much as it does in orthodox legal doctrine and theory. In some cases, what is in question is only the proper attribution of phenomena to either side of an ostensibly natural division between persons and things. Elsewhere, an immanent critique of legal constructs is underpinned by the untheorised assumption that legal rules *correspond* to natural or social facts.[1] Of course, there are studies of the legal status of women which develop sophisticated analyses of legal categories as ideological constructs.[2] But even where the legal person is analysed in these terms, the division between persons and things remains a silent premise; it resurfaces as a methodological commitment to a distinction between construction and reality; or, in Marxist terms, between science and ideology.[3] The contributions to this book approach the question of fabrication without assuming a division between persons and things, either as a basic truth about the nature of phenomena they observe, or as a methodological postulate

[1] As in M. Davies and N. Naffine, *Are Persons Property?* (Dartmouth, Ashgate, 2001). See, e.g., at p. 99: 'possessive individualism in law, though still robust in contemporary legal thinking, fails to supply a sensible, credible understanding of our embodied selves'; and, on the same page, possessive individualism is said to 'deal poorly with the facts of female embodiment'.

[2] See notably Mary Poovey, *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Virago, London, 1989).

[3] See, e.g., the observations on social constructivism that are made in Bruno Latour, Chapter 3.

which structures observation itself. The distinction between persons and things may be a keystone of the semantic architecture of Western law, but our accounts of fabrication distinguish between the semantic and pragmatic dimensions of law. From that perspective, the distinction becomes a contingent form, which is sustained by modes of social action which are productively misunderstood[4] by legal semantics.

The distinction between persons is interesting not because there is some critical discrepancy between the legal construction of the person and the natural reality of human individuality, but because it is becoming clear that the *act of distinguishing* between these two orders is itself radically contingent. In other words, the question now is not how to fit entities into the 'right' category, but to explore the emergence and deployment of the category itself. It is becoming increasingly clear that in Western legal systems, as elsewhere, 'the order of things is determined by decision, a distinction, that itself is not ordered'.[5] So, whereas critiques of law have so far treated the category of person/thing as an embedded feature of the world (either in the sense that it mirrors the ontological structure of the world, or in the sense that it defines the terms in which we apprehend the world), the approach taken in this volume treats it as a purely semantic, aesthetic, or ritual form, which is produced by particular perspectives or techniques. The distinction 'is not itself ordered' because it is referable to these emergent ways of seeing and doing rather than to the ontological architecture of the world. Not all of the contributors to this volume share the vocabulary of divisions and distinctions (which is drawn from systems theory) or the theoretical approach which it expresses, but all are concerned to apprehend legal and social action without presupposing a categorical division between persons and things. More importantly, perhaps, all of the contributions drop the theoretical prejudice built into the old category, which, at least in the case of law, took the person as the privileged term. Whereas traditional accounts of law were concerned only with the question of how persons were constructed ('things' being the implicit antithesis of 'persons') our inquiry is symmetrical, being as much concerned with the fabrication of things as of persons.

[4] For this idea of 'productive misunderstanding', see, e.g., Gunther Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9(3) *Social and Legal Studies* 399.

[5] William Rasch, 'Introduction' to Niklas Luhmann, *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford University Press, Stanford, 2002), p. 24.

RES AND PERSONA

The distinction between persons and things has always been central to legal institutions and procedures. The institutions of Roman law, to the extent that Rome can be taken as the origin of the Western legal tradition, attached persons (*personae*) to things (*res*) by means of a set of legal forms and transactions (*actiones*) which prescribed all of their permissible combinations.[6] In the common law tradition, this sort of division is not as precisely drawn as it is in European codified systems, but the continuing importance of Hohfeld in Anglo-American legal theory testifies to the fact that the common law also assumes this fundamental division.[7] It may even be that, having been constructed and refined in Roman legal institutions, the basic division was taken up in other branches of social theory. There is a very powerful argument that the institutional architecture of Roman law still structures our apprehension of society, and that sociology and political theory are more profoundly 'juridical' than they imagine themselves to be, precisely because they presuppose a basic division between persons and things.[8] Whether or not one subscribes to that argument, it reminds us that the distinction between persons and things is a foundational theme in Western society, and that legal institutions have played an essential role in constituting and maintaining that distinction. Confidence in what Bruno Latour calls the 'old settlement' is no longer as straightforward as it might seem. With the advent of biotechnology patents, biomedical interventions, transgenic crops, and new environmental sensitivities, the distinction between persons and things has become a focus of general social anxiety. In each of these technological areas, persons become indistinguishable from things: gene sequences are at once part of the genetic programme of the person and chemical templates from which drugs are manufactured; embryos are related to their parents by means of the commodifying forms of contract and property, and yet they are *also* persons; depending on the uses to which they are put, the cells of embryos produced by *in vitro* fertilisation might be seen as having either

[6] See W. T. Murphy, *The Oldest Social Science* (Oxford University Press, Oxford, 1997), ch. 1.

[7] The classic texts are W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 26 *Yale Law Journal* 16; 'Some Fundamental Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.

[8] The most sophisticated argument is found in Gillian Rose, *Dialectic of Nihilism* (Basil Blackwell, Oxford, 1984).

the 'natural' developmental potential of the human person or the technical 'pluripotentiality' that makes them such a valuable resource for research into gene therapies. In each of these cases, the categorisation of an entity as a person or a thing is dependent upon a contingent distinction rather than an embedded division.

Accordingly to popular perception, legal institutions are supposed to be based on a natural division between persons and things, and yet now they seem systematically to transgress that natural ordering. For example, intellectual property laws reinforce the grip of pharmaceuticals corporations on human tissues, family law tolerates or endorses the commodification of gametes and embryos, and bio-ethical legislation allows various kinds of therapeutic research on (human) embryos. Attention is (again) directed to the question of how to distinguish persons from things, and it is often argued that new developments imply a fundamental departure from the 'original' legal constitution of the two categories. In these circumstances it seems especially appropriate to (re-)consider the making of persons and things in legal settings. Whatever one makes of the idea that we still have to reckon with the legacy of Roman law,[9] contemporary critiques of technology implicitly appeal to some notion of a tradition conserved by law. It is therefore quite timely to explore the fabrication of persons and things from a historical-anthropological perspective, by paying attention to the different contexts in which these legal categories have been deployed, and by extending the inquiry beyond Western institutions. The contributions to this book suggest that persons and things have multiple genealogies, and that their uses are too varied to be reduced to one single institutional architecture. Each form or transaction constitutes persons/things in its own way. This has some important implications. Although the theme of slavery still informs critiques of contemporary technology (it is often asked, for example, how the 'ownership' of genes or embryos is different from the ownership of slaves) the real problem is that we can no longer divide the world into the two registers that are presupposed by any argument against slavery. Now, the problem is that humans are *neither* person *nor* thing, or simultaneously person *and* thing, so that law quite literally *makes* the difference.[10] This book develops a

[9] This is the perspective adopted by the legal anthropology of Pierre Legendre, which is presented in his *De la société comme texte* (Fayard, Paris, 2002).

[10] There is a resonance between emergent social anxieties and the recent questioning of the distinction between persons and things in science studies (e.g., Bruno Latour, *Politiques de la nature* (La Découverte, Paris, 1999), esp. chs. 1 and 2).

number of perspectives on the kind of 'in-between' action which produces legal form, and especially persons and things: network action and circulating reference, institutional fictions, indexes of attachment, the manipulation of semantic potential, and so on. And this is precisely where ethnographic observation complements legal-theoretical analysis. Although not all of the essays are about Western law, and although one or two have little to say about legal institutions as such, each offers a resource for re-thinking the composition of persons and things, the modes in which they are distinguished and (re-)combined by legal institutions.

One particular sub-institution – ownership – is central to the treatment of personification and reification. To some extent this may be inevitable, because ownership is so often taken to be the keystone of legal and social institutions. Certainly, ownership is the context in which legal doctrine and legal theory have worked out the capacities or competences of persons *in relation* to things, and ownership is the thematic 'channel' through which these doctrinal glosses have made their way into general circulation in society. Ownership is the setting in which the legal constitution of persons and things has become most vulnerable to social and technological developments. Through the use of biomedical technologies, human beings have acquired potentialities which are actualised in a new set of claims and attachments. Law, and property law in particular, is asked to construe 'claims for which no prior transactional idiom [exists]'.[11] This is not just a variation on the old argument that law lags behind society (in any case, we should now conceive of law *in* society rather than law *and* society).[12] Western law (or, more precisely, adjudication) has always taken shape 'between' convention and invention; the paradox arises from the manner in which legal procedures invent the tradition which they purport only to continue.[13] The trouble with biomedicine and biotechnology is that they expose the paradox for what it is, and a number of our contributors identify reasons why Western law is finding it increasingly difficult to manage contingency in the 'traditional' ways. The tension between tradition

[11] Marilyn Strathern, 'Potential Property: Intellectual Rights and Property in Persons' (1996) 4 *Social Anthropology* 1, 17–32, at p. 18.

[12] See generally Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1995).

[13] There is a wonderful illustration of this in F.W. Maitland, 'Why the History of English law is Not Written' in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, Cambridge, 1911).

and modernity, as it affects the central contexts of legal personification and reification (kinship, ownership, production), is an important theme in contemporary anthropology. And, even though it is not explicitly addressed by all of our contributors, it is an essential theme in the collection as a whole; for example, Yan Thomas' analysis of the Roman law relating to dead bodies is written against the backdrop of developments in contemporary law relating to the legal status of the body and its tissues.

This is just one sense in which our reflection on personification and reification in law brings together law *and* anthropology.[14] The questions raised by biotechnology and biomedicine are compounded by the effects of 'globalisation'. To begin with, the extension of corporate and institutional networks re-contextualises cultural forms; the point is not that the world is becoming progressively more uniform,[15] but that globalisation brings with it new sensitivities to the distinction between local and global. This is an anthropological question: 'whether one lives in Papua New Guinea or in Britain, cultural categories are being dissolved and re-formed at a tempo that calls for reflection, and that, I would add, calls for the kind of lateral reflection afforded by ethnographic insight'.[16] But these sensitivities have important implications for the (self-)conceptualisation of law. The expansion of legal discourses beyond their national limits elicits new conceptions of the agency or fabrication of law.[17] How should law be identified if the old emblems of state power are no longer available? One response is given in Gunther Teubner's interpretation of global law in terms of autopoietic theory, which develops the old anthropological theme of legal pluralism into the model of a legal discourse that sustains itself without reference to a local, national, authority.[18] Legal action is re-defined. In place of hierarchy, sovereignty, and domination, law is construed as a discourse that consists only in actualisation (its use in communication) rather than

[14] The complexities of this mediating 'and' cannot be discussed extensively here. See, Annelise Riles, 'Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity' (1994) 3 *University of Illinois Law Review* 597.

[15] A recent issue of the French legal journal *Archives de la Philosophie du Droit* was entitled 'L'américanisation du droit'.

[16] See Marilyn Strathern, *Property, Substance and Effect* (Athlone, London, 1999), p. 24.

[17] On this theme see generally A. Riles, *The Network Inside Out* (Michigan University Press, Ann Arbor, 1999).

[18] G. Teubner (ed.), *Global Law Without a State* (Dartmouth, Aldershot, 1997).

in substance (a corpus of texts or an institution of domination). Again, the implications of globalisation are more explicitly addressed in certain contributions, notably those by Murphy, Strathern, and Küchler, but the new contexts of legal-cultural idioms define another of the major thematic horizons of the collection as a whole. Globalisation joins biotechnology in eliciting new conceptions of the functioning of legal institutions.

More abstractly, these essays on personification and reification are situated at a particular juncture in social theory. To borrow Niklas Luhmann's characterisation, one might say that contemporary theories of society are faced with the difficulty of changing their theoretical 'instrumentation' from a schema of 'division' to a schema of 'distinction'.[19] Classically – from Aristotle to Hegel, that is – theories divided the world into foundational oppositions, which were inscribed in the very texture of the world or in the categories through which the world was (necessarily) experienced; as in, for example, the basic categories of space (near/far), time (past/future), or action (intention/effect).[20] Taking the example of time, the classical scheme takes the division between past and future to be embedded in the categories of experience in such a way that the present moment from which the world is observed is lodged in a succession of modal 'presents': past present, actual present, and future present.[21] The predicament involved in transforming division-based schemes into distinction-based forms arises from the recognition that this linear scheme has become 'dis-embedded', so that the present becomes referable to a particular observer rather than a position embedded in a linear succession. In other words, the form of the distinction is contingent on the observer who draws it: 'in the case of distinction, everything depends on how the boundary that divides two sides (that is, the distinction) is drawn'.[22] In the case of time, this is exemplified by the emergence of the predicament of risk, which arises

[19] Niklas Luhmann, *Observations on Modernity* (Stanford University Press, Stanford, 1998), esp. ch. 4. Luhmann may be more familiar in legal theory than in anthropological theory, but see (e.g.) Sari Wastell, 'Presuming Scale, Making Diversity' (2001) 21(2) *Critique of Anthropology* 185.

[20] For a fuller discussion, see Luhmann, *Observations on Modernity*.

[21] See also Jacques Derrida, *Specters of Marx* (Routledge, London, 1994).

[22] Luhmann, *Observations on Modernity*, at p. 87. This is not just another form of 'relativism', if only because the distinction between relativism and objectivity loses its pertinence when theory begins from the premise of self-reference rather than correspondence.