

Law, Anthropology, and the Constitution of the Social: Making Persons and Things

Alain Pottage and Martha Mundy (eds)

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The categorical division between persons and things has traditionally been treated by law as something embedded in the world. There has remained a 'methodological commitment to a distinction between construction and reality' (p 3). Western legal cultures have tended to argue or perpetuate the idea that legal institutions should uphold a division between persons and things. Outcries in the past over slavery and ownership of persons, and more recently with regard to appropriation of the intellectual resources of communities or the patenting of human genomes, evidence a strong desire to maintain the divisions of person and thing. However, recent developments indicate a 'transgression' by the legal institutions of such a 'natural order' where pharmaceuticals corporations have (via intellectual property law) a grip on human tissues and 'bio-ethical legislation allows various kinds of therapeutic research on (human) embryos' (p 5). Thus the 'self-evidence' of the 'legal boundary between persons and things' (p 1) can no longer be assumed. As such, *Law, Anthropology, and the Constitution of the Social* explores and argues about how legal and anthropological institutions construct the categories of person and thing, *persona* and *res*.

This interesting collection of essays covers a large range of topics, each exploring how legal techniques fabricate or construct the categories of person and thing. Yan Thomas examines the Roman law on tombs and the way in which the law protected the tombs instituted by bodies or remains that were not themselves protected. Bruno Latour compares the 'disinterested and unprejudiced' approaches of both law and science via ethnographic observation of their two 'laboratories': the Ecole de Physique-Chimie and the Conseil d'Etat. Tim Murphy, in his chapter 'Legal Fabrications and the Case of "Cultural Property"' questions what it is that the technologies of law make (via either mass-production or positivisation) and then how the law has played a part in the emergence of the phenomena of 'cultural property'. Martha Mundy examines the development of private property law, particularly the nature of the military 'fief' in the Islamic Ottoman Empire where, in contrast to Western/European traditions, there was not a political ideology of property asserting an absolute division between persons and things until the end of the nineteenth century. Further exploration of Islamic law is undertaken in the chapter by Engin Deniz Akarli, highlighting the way, in relation to a trader's or artisan's *gedik*, ownership did not entail an absolute right over a thing but a combination of certain entitlements, obligations and responsibilities which could change over time. Marilyn Strathern, as we shall see below, considers the way in which Melanesian concepts of compensation payment in Papua New Guinea reflect different notions of ownership of 'persons'. Susanne Küchler argues for a 're-visualising' of attachment via the understanding of a paradigm of 'non-linearity' that goes beyond or does away with strict notions

of cause and effect. Such notions are picked up by Alain Pottage in the final chapter, where he discusses the results of new discoveries regarding the 'heritage of humanity' in modern bio-ethics arguing that genes are more ambiguous than previously thought.

The approach of these articles treats the category of person/thing as a 'purely semantic, aesthetic, or ritual form, which is produced by particular perspectives or techniques' (p 3), and does not assume the superiority of the category of person. The argument is that 'the categorisation of an entity as a person or a thing is dependent upon a contingent rather than an embedded division', of which the institutions of law and anthropology are the chief constructors. Each chapter takes a different situation or topic and drills down to the underlying constructions (or lack thereof) of these categories.

In relation to the Roman law of tombs, Yan Thomas explores the way that bodily remains are reified to institute the order of *res religiosae*, or the things of religious law. The creation of a tomb relied on the presence of the bodily remains. If they had been instituted, then the designation of *res religiosae* protected the tomb from violation. While initially we could assume such protection was related to religious beliefs regarding the pollution of the living by the dead, Thomas shows that the law was not operating with regard to such beliefs (p 61). Rather, the technical process of defining what was a *locus religiosae* related to market issues, particularly to the fact that those things designated *res religiosae* were inalienable and could not be purchased or sold. A potential problem would arise if a body was in a number of pieces and could thus lay claim to a number of *res religiosae*. As such, it was held that each body (as represented by the head) could only institute one *res religiosae* so as to prevent the creation of numerous tombs from a single body (p 50). However, the process of reification of the bodily remains actually bypasses their physical state. The remains could either be there in their entirety (or some state of decomposition), as ashes, or merely as waxen images or masks of the head (known as an *imagines*). However, as soon as the body was placed in the tomb, legally the remains were thought of as the reduced bones or ashes of the body in its entirety, despite what had actually been placed there (p 49).

The law in relation to tombs protected the material surrounding the body (the tomb, the superstructure and the ground supporting it) but not the remains themselves (pp 56–57). Thus the law was not concerned with the deceased itself but, via a fiction, reified the deceased and then constituted the tomb as a legal thing which it protected (thus protecting the container of a fabricated thing). Removal of the body subsequently destroyed the status of *res religiosae*, and thus the laws against violation of a tomb were not in relation to the violation of the body or the religious beliefs against the mixing of the living and the dead but in regard to the status of the *thing* which the body instituted. Destroying the *res religiosae* also destroyed the inalienability of the tomb, its superstructure and the land on which it was constructed. The process involved the creation (reification) of things from the remains, which in turn instituted the legal container which was used to institute a spatial limit — a prohibition which could be perceived via the legal thing of the tomb. This process of reification created the very thing that was then protected.

Following on from this, Marilyn Strathern's contribution discusses the production of bodily 'wholeness' with examples from Melanesia (particularly Papua New Guinea). She notes that, in Western traditions, ownership of the 'whole' of a person is prohibited. However, with body parts (now including genes and gametes) being detachable, ownership of the 'things' of the body becomes an issue. The 'whole' body may not be owned (as a person), but a body part may be owned as a thing (pp 31, 214). In contrast, it is the 'whole' which may be owned in Melanesian kinship relations. Where a person becomes claimed by another 'as singular, entire, and *whole*', they become, in a sense, reified (p 216). Persons are partible: they have multiple roles in which they 'are always half hidden from one another' (p 216). The relations, however, become visible 'in the position by which persons divide themselves off from one another' (p 216). It is as persons step forward to be seen in a particular role that they take on the 'image' of that role. That image is one which is 'created' by the clan: 'It is to her husband's clan that a prospective wife exists as a bride — this is the image of the woman which they have, so to speak, created. They own it.' (p 217)

Thus people are reified as 'whole and singular entities' (p 217). Unlike the Western conception, where the ownership of the whole of a person or even of the 'image' (in terms of the way they present themselves in society) of a person is impermissible and reacted against, the obligations instituted here by kinship actually allow for this ownership of such images. Strathern goes further to argue that this way in which 'persons visualize themselves as carried by other persons' and their relations with others is an important 'intellectual resource' which opens up ways of understanding 'what it is as human beings we might own of one another' (p 233).

Alain Pottage picks up further on the account of reification of particular body parts by analysing recent developments in modern bio-ethics and gene sequencing. He examines the way in which claims that gene sequences are 'the heritage of humanity' actually (re)institute the categories of persons and things as primordial conditions via a (re)introduction of the concepts of patrimony into biology. Such arguments depend upon an attachment of the division between persons and things to the 'biological distinction between genotype and phenotype' (p 256).¹ The heir in this orientation of patrimony is turned into the 'instrument or effect of his or her inheritance.' In biological terms, the 'phenotype is absolutely commanded by the genotype' (p 258). Pottage points out that the foundational dogma of gene biology (that protein is never a cause of DNA) has begun to be dissolved by experimental observations which

¹ A genotype is the 'genetic composition of an organism ... the combination of alleles it possesses'. A phenotype is the 'observable characteristics of the organism.' The *Oxford Dictionary of Biology* states that phenotypes 'are determined by [their] genes ... the dominance relationships between the alleles, and by the interaction of the genes with the environment'. See www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t6.e3359

suggest that 'the role of genes should be conceived in terms of a model of cellular epigenesis rather than a paradigm of genetic determinism' (p 266).²

That is, genes develop into a greater level of complexity rather than being pre-determined by the genotype. The distinction between phenotype and genotype can no longer sustain the idea of patrimony, which splits persons and things. Such divisions are dissolved by this new epigenesist orientation (which comes partly from the observation that our genotypes are not inherited directly or exactly, but rather our genotypes come partly from one parent and partly from the other, resulting in an end-product that is different to either of its inputs). The argument is that the distinction between phenotype and genotype is not a division of the natural order of things but rather a distinction that is superimposed. The process of stating that the distinctions between *persona* and *res* are natural divisions actually institutes these divisions. Legal or ethical techniques which claim to merely reflect the division between norm and nature in fact institute or construct the 'nature' they are claiming to reflect.

The assumption (according to Pottage) underlying the arguments aimed at protecting our 'genetic patrimony' — so that they may not be commodified — is 'that the genome is a resource that exists independently of the techniques which are used to visualize it and to map its contours' (p 271). However: 'Life itself is *neither* the map *nor* the territory, but emerges between the two terms, always outstripping and reconstituting the two ...' (p 272) Pottage furthers this argument in relation to the themes of the book by saying that: 'If genes are *either* the building blocks of life *or* simple chemical compounds, then they are inherently *neither* one *nor* the other. What they are depends upon how they are actualized, and if the way they turn out depends on human self-identification, then it is clear that 'ethics' constituted the order which it claims only to recognise and protect.' (p 284)

The result is the understanding that the status of genes is ambiguous, as they can be considered not only 'as elements of the programme that constitutes the physical form of living beings ... but also as simple chemical molecules available for (commercial, biotechnological) synthesis' (p 283). Thus the distinction *really is* made by law and ethics and their fabrication of the categories of person and thing.

The collection of essays in *Law, Anthropology, and the Constitution of the Social*, displays vividly the ways legal and anthropological techniques fabricate the notions of persons and things. While some of its content is difficult, it provides a good basis for further research in a wide range of areas and makes way for further exploration of such approaches to our understanding of society and its fabrication.

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² Epigenesis is the development of heritable changes that are not the result of changes in DNA sequence. Thus the change in understanding Pottage is describing is a movement from a belief that the phenotype was determined purely by the genotype to a process of epigenesis where changes in the phenotype are not (at least purely) a result of changes in the DNA sequence of the genotype. See www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t6.e5861.