

BOOK REVIEW

Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law*, Saskia Brown trans. (New York: Verso, 2007, xxv, 256 pp., \$34.95 (hardcover))

reviewed by Peter Goodrich[†]

I cannot remember the details, but there was a review of D.H. Lawrence's *Lady Chatterley's Lover* in *Gamekeeper's Monthly*, or a journal with a similar resonance. The reviewer offered a brief overview of the plot and summarized the many outdoor scenes and the author's penchant for naked encounter. After proffering a few observations, the reviewer concluded that there was little of use to gamekeepers in the book reviewed. No new ground was broken with respect to the issues of tracking, trapping, breeding, and preserving that were the principal concerns of the journal's readership. It is difficult not to embark on a similar narrative in relation to Alain Supiot's recently translated study of *Homo Juridicus*. It offers little substantive sustenance to labor lawyers, its concerns are philosophical and trans-historical and relate in the main to the decline of the universal law, the Roman tradition, and the collapse of the symbolic that this decline threatens. Inside this grand schema, however, is a trenchant and effective critique of current trends in legal scholarship and a powerful defense of the role of the scholar as mediator, interposed between legislation and judgment, precedent, and application.

Homo Juridicus follows in the tradition of *homo economicus*, and *homo aestheticus*, as predicating a universal function to an attribute of human community. Drawing on the work of the French legal philologist turned lacanian theorist of law, Pierre Legendre, Supiot defines legal humanity as universal in the sense that subject and community are alike instituted and defined by law. The person is a legal invention and lives and dies within the symbolic framework of the law. There is no identity—*persona* or mask—outside of institution and law, and by similar tokens the human group or community is defined by reference to the legal definitions of family, institution, and nation. These are our inherited juridical

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structures, the dogmatic frameworks of social place and position into which we are born and within which we not only die but are in theory willing to die, as in *dulce et decorum est pro patria mori*. As opposed to the blind faith that propels a subject to death for a cause, a nation, a sovereign, law is a structure and space of reason within which to converse and contest the dictates of the political. The dogmatic tradition is a structural inheritance and provides an established hermeneutics that allows for a social dialogue as to rights, values, and moral choices in contexts of social charge or communal conflict.

The dogmatic function is conceived by Supiot not so much as a substantive body of norms as a space of discourse, a legally protected site in which social negotiations as to moral choices, political decisions, and their effects upon groups of subjects can be mediated and prolonged. It offers formalities, the custody and passage of tradition, the face of history set before the steamroller of contemporary desire. In common law terms, dogma invokes a discussion between social groups and genres of discourse, the disparate domains of knowledge and interest. The vital feature of the dogmatic function is that it does not belong to anyone, it is heteronomous, in between, an art of interpretation and transmission, a circumscribed space of discourse in which opposed interests can be staged and reviewed. The dogmatist is thus an interpreter, a scholar, a mediator who uses the fully panoply of legal resources, the diversity of disciplines, the multitude of cases, the copious prolixity of doctrinal treatises, history, and literature to question power and to challenge imposition. It is this heteronomous and autonomous function, the work of the jurist as an independent figure, that has increasingly come under attack. *Homo juridicus* is a threatened species and Supiot, in inventing this figure, is as much drawing attention to his disappearance as describing a functioning reality.

The narrative of Supiot's treatise is one of decline. The dogmatic tradition is in origin one of revelation, of *jus* or oral law as much as of *lex* and legislation. Dating the decline of dogma to the Reformation and the Protestant reduction of faith to a single text, *sola scriptura*, Supiot endeavors to revive the scope and diversity of the legal function by addressing the plurality of sources that make up the classical legal tradition. The principal inspiration for his account of the plenitude of the dogmatic tradition is the work of Pierre Legendre, a Lacanian jurist who has devoted many works of complex theory and history to defining and defending the dogmatic function. For Legendre, the dogmatic tradition is more imagistic than merely textual, as much unconscious and affective as it is strictly rational and written. The question that dogma poses is genealogical and aesthetic: who are we, what do we look like, what is law for us? These are questions that relate directly to the staging of the social, to the ceremonies,

images, and rites that institute the human as human, the community as a human community, and its judgments as the body of laws. The legal frame is a theatrical frame, a process of solemnization whereby structural values and social places are established and enshrined.

The dogmatic tradition sets up the institution as the space and normative order of social belonging. Within this tradition, law is primarily the set of rules that allow for contained disputes as to social values according to norms of reason that subsist outside of the subject-matter of dispute. Reason, of course, is a big word but refers to a facet of human being, to an ability to reason, a natural faculty and skill that gains expression in law but draws its inspiration and invents its arguments by recourse to the *auctoritates poetarum*, as Sir Edward Coke calls them, meaning the full panoply of the humanist tradition. Be concrete about it: Should a corporation be entitled to fire an at will employee after she has complained of racially motivated demeaning treatment by her line supervisor? Insofar as a number of common law norms and statutory rules impinge upon this question it raises points of doctrinal interest. To answer these intelligently requires reasoning at the very least as to the value of a person, the role of labor in forming identity, the significance of race, the rights of persons, and the interpretation of contract. Black letter law can provide little guidance as to the questions that structure such a discussion. It is rather a matter of legal doctrine meaning that it is the broader tradition, the humanist text, that needs to be scrutinized and interpreted. This is why the early modern lawyers said that a jurist had to know theology, philosophy, ethics, poetics, philology, and more. This, for Supiot, is the dogmatic spirit or will to doctrine that is now disappearing.

The post-Reformation legal tradition has reduced the law increasingly to the letter. They have ignored the Pauline dictum that the letter kills and have become oblivious to the spirit that gives life. Thus it has been increasingly the minutiae of the text that have covered over the reason of law and the humanistic function of the lawyer. In place of dogma and the values of reason and discourse, the lawyers have shrunk their role to that of accommodating the market. Efficiency replaces value. Economics overrides doctrine in favor of corporate models of exchange. The example that Supiot uses is that of the mutation of contract from a fundamentally ethical commitment, based upon trust and promise, to a Holmesian calculus of efficiency without respect for persons or community. Think of it by way of reference to the developing law of rolling contracts and the Seventh Circuit's advocacy of agreement now, terms later. A consumer orders goods over the phone, agrees to a price, pays by credit card. The corporation ships the goods with terms enclosed that contain stringent restrictions upon consumer rights and makes receipt and retention of the

goods for twenty days the expression of acceptance of the “shrinkwrap” terms. According to the Seventh Circuit this form of arrangement is market driven and economically desirable. It makes goods cheaper, it satisfies demand for the most competitively priced commodities and if consumers really do want more by way of warranties then they can either reject the goods or purchase more expensive items with guarantees whose cost has been internalized.

The development of a law of rolling contracts is an intriguing instance of what Supiot defines as the decline of the juridical. The classical law of contract expressed values that derived from theology. The key concepts were faith, as in *bona fides*, relationship, belief in the person, reciprocity, the word as bond, and much more. Within that doctrinal lexicon, cases of unwarranted imposition, unconscionable practice, or bad faith performance could be debated and resolved according to the rational deliberations of the courts as to the values that particular forms of agreement and of breach expressed. What should be done was as much a question of doctrine and interpretation, of the evaluation of conduct and the assessment of consequences, as of any implausible or mechanical application of rules. Yet in the development of rules that mirror market practice in the rolling contract cases there is no discussion of contract values or the social context of corporate consumer relations. There is the market, there is the economic law of exchange and then a supine need to follow that economic dictate in court decisions that are less to do with legal doctrine than judicial imaginings of what the invisible hand of the market actually dictates.

In Supiot's analysis, *homo juridicus* is here seen in his death throws. This kind of development, and internet contracting makes market governed imposition of terms increasingly easy, evidences a radical erasure of law. If legal dogmatics spells the space of thought within law, the discursive site where economic dictates can be challenged and political superiority questioned, then the erasure of law means the extinction of that space where such questions can be posed and debated. The first act of the tyrant is to kill the juridical subject, Supiot here follows Hannah Arendt, but applies this observation to the market economy and private contracting. Law favors delay and deliberation, whereas the market seeks speed and simple persuasion. Transmission takes precedence over text, calculus replaces cerebration, numbers stand in for interpretations.

The death of the jurist, the loss of their humanistic tradition and their textual storehouses of arguments diminishes the social. More than that and worse than that, the abdication of the site of dogma as a space of discourse removes a crucial moment of social rationality from the self-image of the social. Lawyers were intermediaries, they held up the onward roll of sovereign authority or corporate dictate to the review of reason, and now

that moment, which it must be admitted was not always a socially successful mode of decision making, has gone. In its place, a brave new world of post-textual, virtual entities, extant without boundaries on the web. The institution of law, the institution as such, begins to crumble in the face of unmediated communication. The hypertext (html) now means that anything can be treated as text. The law as text, as document or body, has dissolved into the morass of electronic communications. The personal computer (PC) has replaced the geographically located person and with him the collective presence of labor also disappears into a non-specific domain of portals and IP protocols. The world wide web (www) has erased all boundaries, national, and other. Abbrev. is the new form of non-interpretation.

Supiot paints a dark picture, but from the point of view of a labor lawyer over the last decade it is probably more accurate than not. A new feudalism without legal protections seems to loom over the scene of labor relations and employment agreements. The market does what it wants and indeed seems currently to continue to do so in the absence of any legal structures relevant in practice to the regulation of corporate fantasies of omnipotence. For Supiot the question is how to draw this world of simulation and boundless corporate ambition back into language, into reason and law.

The answer is broad and generously humanistic. There needs to be a return to a social hermeneutics of law and this means a revival of dogma and of what we common lawyers would term doctrine. By this, Supiot intends a renewal of the reflective and discursive intellectual patterns of common law, a return if you will to the humanistic scholarly traditions of interdisciplinary legal study. The doors of interpretation have been slammed shut by economism and positivism. They must be reopened, and for this to happen our concept of doctrine and law has to be greatly expanded. Opening the doors of interpretation means recognizing the value of scholarship and doctrine, acknowledging the value of dogma as a resource, and then putting it into active play. The textual tradition of law, the treatises and judgments, the poetic and literary resources, the disciplinary borrowings, the hermeneutic encodings, the enigmas and images that the tradition represents and carries are all internal to it and available to study, scrutiny, and recollection.

In addition to the sociology of new media of legal communication, what is most interesting to common lawyers in Supiot's careful and erudite study is probably the reassertion of the place of the scholar and the importance of doctrine in defending law. The legal academy, which is routinely dismissed as out of touch, lacking relevance, inward looking, incomprehensible, and more, needs to reassert its place and find its voice.

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If critical legal studies—remember that?—suffered from a tendency to overstatement, a yearning for revolution mixed with an inclination toward the end of things, it may be time for critique 2, a viral and internal scholarly critique that this time takes law extremely seriously. Taking law seriously as a social and ethical project means treating law as more than law, treating it as political philosophy, as imperium subject to the protocols of diplomacy, and as rule open to interpretation. The last words, however, can go to Supiot: “We know at least since Gaius that in setting the institutional scene we must attend not only to persons and things, but also to action—that is, the right of persons to challenge the *status quo*.” (page 184) We need our conflicts, our pathologies, to see the light of day, and with it, indeed in it, the reason of law.