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ARTICLE

A concise note on Peter Fitzpatrick's 'Racism and the innocence of law'

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Abstract

I have long felt that Peter Fitzpatrick's 1987 paper, 'Racism and the innocence of law', should be closely studied by all law students during, or shortly after, their induction to the study of law. These concise notes on the paper are written primarily in tribute to a friend, colleague and mentor but, in writing them, I hope also to demonstrate how this early instance of a theory about how law is intertwined in racial capitalism could be taught in those law schools that harbour ambitions to be not only critical, but also *decolonial*. Inevitably, in such a short piece, choices have had to be made about which aspects of the paper to foreground and which to leave out entirely. I trust that my decision to focus on those aspects that can be more readily comprehended by a student with limited knowledge of legal theory and substantive fields of law will not be thought to have unduly watered down its meaning.

Keywords: racial capitalism; equality law; law and justiciability; critical legal pedagogy; liberal legality

1 Fitzpatrick on racial capitalism

Cedric Robinson's compelling 1983 work, *Black Marxism: The Making of a Black Radical Tradition* (Robinson, 2000), amply demonstrates that the history of capitalism is no less than a history of racism. This, too, is the opening premise of 'Racism and the innocence of law' (Fitzpatrick, 1987, pp. 119–121). From this primary assertion come three elements of a strategy that Fitzpatrick offers to anyone intent on embarking on a legal critique of capitalism. Two of these, to my mind, are prescriptive and the third is intended to sound a note of caution. The first is that racism, understood 'in an extended way to cover both belief and practice' (Fitzpatrick, 1987, p. 119), cannot be assigned to the footnotes or margins of theory. The second is that any such theory must be propelled by the experiences of racialised people, noting, in particular, that racism is manifested in microaggressions: for 'a multitude of oppressions are effected by the mundane and the obvious' (Fitzpatrick, 1987, p. 123) as well as in calamitous acts of violence. The third is that, when studying racial capitalism, scholars must be wary of the impulse to 'retrieve law and add to the list of obviously desirable variants on how to combat racism through law' (Fitzpatrick, 1987, p. 119). Why? Because, of all the various '[m]onuments to liberalism' (Fitzpatrick, 1987, p. 120), law has been the most adept at concealing the fact that its foundations are rooted in racism.

2 Fitzpatrick on law

To fully appreciate how Fitzpatrick's understanding of European law and legal phenomena is able to encompass racial capitalism is impossible without attention to at least two of his major works: *The Mythology of Modern Law* (Fitzpatrick, 1992) and *Modernism and the Grounds of Law* (Fitzpatrick, 2001). Nevertheless, the following short paragraph from 'Racism and the innocence of law' contains the seeds of a theory of law that, in its elaborated forms, have inspired a generation of scholars

committed to analysing law through critical race and post-colonial frameworks. These notes are structured around Fitzpatrick's argument that law can be conceived of *as racism* – in the sense that

> '[L]aw positively acquires identity by taking elements of racism into itself and shaping them in its own terms. Yet law also takes identity from its opposition to and separation from racism. But this very opposition is not innocent for it operates by containing and constraining law. Law, as a result, and contrary to the principle of universality, is unable assuredly to counter racism. This is not just to say, along with assertions of critical legal scholars about the family and workplace, that by not entering areas where racism or sexism is prevalent law implicitly confers powers on those who are dominant within them. Such a line of argument leaves law competent to intervene and counter that power and, of course, liberal legality is only a claim about competence, about being able to cover things, not about actual coverage. The point here is that racism marks constitutive boundaries of law, persistent limits on its competence and scope. Being so limited, law proves to be compatible with racism.' (Fitzpatrick, 1987, p. 122)

The extract above is just one instance of a series of challenging ideas that Fitzpatrick invites his readers to entertain. One way of engaging with these ideas is to understand from the outset that, although Fitzpatrick provides a situated example (to be discussed later in this note) of the fact that, despite its denial, law is deeply implicated in racism, unearthing such evidence is not his primary aim. As I intimated earlier, it is difficult to do justice to the paper without recognising its investment in the development of strategies or methods of critique. The paper's evocative title indicates – in broad terms – the locus of a legal critique of racial capitalism by calling attention to the myriad ways in which the claim that law is separate from the material forms in which racism exists is *stated and restated*. To be more precise, the problem that critical engagements with racial capitalism must confront a priori is the problem that Fitzpatrick grapples with within the paper. This problem can be stated in the following terms: how can sense be made of the positivist view that law is a force that is 'radically separate from' (Fitzpatrick, 1987, p. 121) the human and animal life, and the objects and situations, that it purports to regulate in light of the 'experience of those for whom law is not separate from, much less able to order or correct that part of material life called racism' (Fitzpatrick, 1987, p. 121)? For Fitzpatrick, simply to challenge, by way of contrary evidence, the factual basis of the theories that seek to divorce law from 'material life' is a necessary but not sufficient task of a legal critique of racial capitalism, for such a limited method, by definition, cannot address the problem that, factual accuracy aside, a 'powerful closure [has been] erected around liberal legality' (Fitzpatrick, 1987, p. 121). Thus, situated examples become 'telling instances' (Fitzpatrick, 1987, p. 120) only when '[w]e "respect" the terms of separation, that is … we … attack the foundation and show that those very terms of separation are racist' (Fitzpatrick, 1987, p. 122).

Once it is accepted that law's claim to be separate from material life, including the material life of racism, is a claim that is itself rooted in racism, it becomes a relatively easy task to demonstrate how, in order to maintain that separation, law (to paraphrase Fitzpatrick) reconfigures racist beliefs and practices within its own frameworks and vocabularies. The great value of 'Racism and the innocence of law' as a teaching tool is that it establishes a framework within which can be inserted a number of instances of how law presents *as* racism. I would certainly exploit this strength and encourage students to research and write their own situated examples. That being the case, it is only fair that I follow up my brief summary (below) of Fitzpatrick's 'telling instance' with one of my own.

3 Race-discrimination legislation as racism

Fitzpatrick's instance of law operating as racism is the application, in the industrial-tribunal setting, of the Race Relations Act 1976[1] (Fitzpatrick, 1987, pp. 123–128). The provisions of the Race Relations

[1] c. 74 (Repealed).

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Act have since been consolidated into the Equality Act 2010.[2] More than thirty years ago, the example appealed to Fitzpatrick not least because it presented him with the challenging and 'provocative' (Fitzpatrick, 1987, p. 122) task of 'establishing racism in legislation aimed at countering it' (Fitzpatrick, 1987, p. 122). What Fitzpatrick's forensic examination reveals is that, in a seeming paradox, race-discrimination legislation *derives its specifically legal character* through its very denial of the constitutive link between racism and that part of capitalism that is expressed through human labour. Such a denial is inherent in the legal form, which insists that

> '[r]ight is attached to the individual legal actor who has to assert this right against the person allegedly in breach of a correlative duty. That breach is a matter of individual wrongdoing. It is something aberrant, a particular episode which disturbs the normal course. It calls for the occasional and discontinuous intervention of legal remedies. These remedies, in turn, need only reassert the normal course, need only focus on the act of the wrongdoer and correct or compensate for it. The form of right deals with deviation, and racism in liberal societies has to be a deviation.' (Fitzpatrick, 1987, p. 123)

Fitzpatrick traces this denial of racism as a systemic, institutionalised form of violence throughout the various stages of the industrial-tribunal process – seeing in it 'a circumscribed ritual of reassertion of a world in which such oppression is non-existent or rare' (Fitzpatrick, 1987, p. 127).

4 Justiciability as racism

My own example is situated within the quasi-legal context of the public inquiry. I use this because it provides a powerful instance of Fitzpatrick's argument that apparently race-neutral concepts – intimately associated with law and the legal process, and, therefore, crucial to law's identity – are composed of 'elements of racism' (Fitzpatrick, 1987, p. 122). The legal concept in question is that of justiciability. It is the technical term used to characterise a question that is capable of being settled in the courts or in a quasi-legal forum, like a public inquiry. Conversely, if a question is deemed to be non-justiciable, it is not suited to legal adjudication. Just over a year ago, I had occasion to read the case of *Daniels v. Prime Minister*[3] in which the justiciability concept played a crucial role. The case concerned a judicial-review challenge that was brought in an effort to extend the terms of reference of the public inquiry into the Grenfell Tower fire so as to enable scrutiny of the causes of the Grenfell Tower fire within the broader historical context of Britain's social-housing policy. The challenge was rejected – the High Court having concluded (inter alia) that the chair of the inquiry (Sir Martin Moore-Bick) acted reasonably in deciding that

> 'The inclusion of such broad questions within the scope of the Inquiry would raise questions of a social, economic and political nature which in my view are not suitable for a judge-led inquiry. They are questions which could more appropriately be examined by a different kind of process or body, one which could include persons who have experience of the provision and management of social housing, local government finances and disaster relief planning.'[4]

Disproportionate numbers of racialised people died or were injured or were made homeless as a consequence of the Grenfell Tower fire. Recourse to the justiciability concept meant that arguments to the effect that the 'fatal mismanagement' (Shilliam, 2018, p. 166) of the Grenfell estate building was traceable to 'longer-term processes of gentrification and social cleansing' (Shilliam, 2018, p. 168), which, in turn, were authorised by decisions on the allocation of public housing based on a 'racialized distinction between deserving and undeserving' (Shilliam, 2018, p. 159), could not be heard (Tuitt,

[2] c. 15.
[3] *R. (On the application of Daniels) v. Prime Minister & Anor* [2018] EWHC (Admin).
[4] *Ibid.*, at [11].

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2019, pp. 119–129). In short, justiciability is a distinctly legal concept that enables the law to identify with the racial capitalitalist logics at play in the allocation of social housing. In the terms of 'Racism and the innocence of law', the decision in *Daniels v. Prime Minister* is a localised instance that illustrates something of more general significance about law (Fitzpatrick, 1987, p. 122): precisely that 'racism marks constitutive boundaries of law, persistent limits on its competence and scope' (Fitzpatrick, 1987, p. 122).

5 Concluding thoughts

Fitzpatrick concludes the extract from the section subtitled 'Racism as law' (reproduced above) with the point that the peculiar characteristics of law that are described in the extract actually 'heightens racism' (Fitzpatrick, 1987, p. 122). As this note tries to follow the broad structure of the paper, I left this observation to be dealt with in my concluding section because Fitzpatrick fleshes out the claim much more substantially in the paper's fourth section (Fitzpatrick, 1987, pp. 128–130). If the law that is operating in the present cannot be divorced from its contexts, then, equally, it cannot be divorced from its past. What in particular causes law to 'heighten racism' is a 'specific historical addition' (Fitzpatrick, 1987, p. 128) to its purportedly universalistic dimensions. This addition can be found in the 'imperialist claim' (Fitzpatrick, 1987, p. 129) that racialised people across the globe knew no consciousness of law until such law was brought to them by Europeans. For Fitzpatrick, claims of this kind resonate whenever race-equality legislation fails to redress (more often fails to even begin to address!) race discrimination in the workplace. From an imperialist/racist perspective, such failure merely confirms that racialised people remain impervious to the civilising qualities of European law and European legal processes, for '[i]f the powerful and persistent ministrations of law do not bring certain racial identities into society that must be because the identities are essentially different and naturally incapable' (Fitzpatrick, 1987, p. 130).

Conflicts of Interest. None

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