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ARTICLE

Myth and concealment at colonial law's foundations

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Abstract
This paper provides an engagement with, and highlights the depth of, Peter Fitzpatrick's careful examination of myths that grounded modern law and its colonial instances. That grounding is shown to be premised on a concealment of basic contradictions behind fictions of a unified law, even though it only appears through negations of others. Intersecting patterns of marginalisation are shown to be constitutive of modern and colonial law, so it is not surprising that current protests should address a basic exclusionary racism that Fitzpatrick's work signalled. It concludes with some reflections on what his work might mean for three current debates.

Keywords: myth and law; modern colonial law; decolonising law; Peter Fitzpatrick; legal pluralism

What lies at the foundations of modern imperial and colonial forms of law? How might we consider surpassing such grounds? Peter Fitzpatrick's early approach to critical legal studies led him to examine these questions (Fitzpatrick and Hunt, 1987), underscoring how modern law surfaced precisely through a dependence on myths that excluded those it categorised as 'other' to its imagined orders (Fitzpatrick, 1995a). Liberal jurisprudence underestimated these questions because it assumed that modern law was uniquely rational and so superior to pre-modern, and supposedly myth-driven, laws of pre-modernity (see Fitzpatrick, 1987; 1995b). At their base, such approaches yielded divisive, dispossessing and marginalising legal domains, especially when asserted as non-mythical, equal, reason-driven, inclusive and progressive.

Akin to Nietzsche's probes into the 'lowly beginnings' that formed Western morality, and the complex concealments through which modern subjects materialised, Fitzpatrick (2001b, p. 55) explored a denial of myth that masked how modern law negotiated an unprecedented deicide – also analogously referenced through Freud's parricidal origin myth (Fitzpatrick, 2001b, pp. 11–20). Once 'God no longer shines through law' (Fitzpatrick, 1992b, p. 62), modern law claimed institutional legitimacy not via ecclesial discourses, but through ideas of universality, reason and science (Fitzpatrick, 2006). It promised social progress that was conceived through racial distinctions of personhood and so-called civilised forms of social life (Fitzpatrick, 2014, p. 126). By favouring reason over the irrational, science over religion, the secular over the sacred, and so on, modern law claimed to have left myth behind (Fitzpatrick, 1992b, p. 28). It asserted itself as part of a universal reality and declared its determinate judgments as progressive guarantors of rational and just socio-legal progress (Fitzpatrick, 2001a).

However, Fitzpatrick challenged this depiction, arguing that myth is a historically privileged, 'sacred, narrative of origins and transformations' that 'sets the limits of the world, of what can be meant and done' (1992b, p. 16), and 'imperatively guides action and establishes patterns of behaviour' (1992b, p. 20). In this sense, myth is basic to law's operations and justifications for monopolising violence (Fitzpatrick, 1992b, pp. 9ff.). But modern law's myth-banishing stories were, ironically, second-order myths that re-enacted an age-old mythology. Stated differently, this law's claims to surpass myth did not signal 'the destruction of myth, but rather its perfection' – modern law, that is, denied 'its own foundation by consigning myth in general to the world of others' (Fitzpatrick, 1992b, p. 10). Consequently,

> 'Myth's basic function, in its European conception, is the conferring of identity on a people. With the creation of modern European identity in Enlightenment the world was reduced to European terms and those terms were equated with universality. That which stood outside of the absolutely universal could only be absolutely different to it.' (Fitzpatrick, 1992b, p. 65)

By denying its mythical origins, modern law not only appeared as a unified, positive and universal force – it also veiled its base as a prohibiting institution. This brought 'together law's contradictory existences into a patterned coherence' (Fitzpatrick, 1992b, p. 2), facilitating the appearance of a universal and even necessary being. But that fragile concord was achieved though negation, exclusion and contradiction – lowly grounds rendered 'mute' by repudiating its mythological roots (Fitzpatrick, 2001b, p. 88; 1992b, p. 2).

Modern law's contradictions were multiple. It paradoxically insinuated itself within, and as a commander of, progress from outside of civil(ised) society (Fitzpatrick, 1992b, p. 6). It made claims to equality but fabricated concepts of unequal others (Fitzpatrick, 2004a). It claimed to determine local matters through finite juridical practices, but could only do so by responding to constantly changing socio-political contexts. Sovereign nations might have demanded juridical resolutions, but they also required law to respond to fluid socio-political forms, such as imperialism and globalisation (Fitzpatrick, 2001b, part 2). To remain relevant, that is, law's local determinations had to be permanently open and responsive to fluid social circumstances and amorphous promises of justice. The irresolvable paradox of being determinate within finite contexts, while promising responsiveness to an incalculable justice associated with changing social relations, served to ground modern law – precisely what a denial of mythical origins papered over (Fitzpatrick, 2004b). Indeed, by claiming to be complete, this contradiction-based law could 'not admit of a position from which its contours could be traced. They have to be found in what the myth denies or negates' (Fitzpatrick, 1992b, p. 43).

Consequently, Fitzpatrick studied banished myths that cultivated modern and colonial law's emergence through contradiction and negation – what it claimed to be by what it was not (2001b, pp. 43–45). Influenced by Said's important work, for instance, he explored this law's grounding in racist, occidental myths. The latter juxtaposed modern law with the supposedly lawless lives of 'primitive/savage' others, underscoring its claims to a rational, civilised and enlightened character (Fitzpatrick, 2001b, pp. 18ff.; 2004). Fitzpatrick's basic point is significant: racist formulations of uncivilised, primitive or lawless others were not ancillary to modern – imperial and colonial – law. Rather, racism lay at the very heart of liberal jurisprudence – a point discussed through engagements with, inter alia, Vitoria (2014), Hobbes, Locke and Austin (2001b, pp. 93ff.), but also through Dworkin and especially Hart's legal positivism (Fitzpatrick, 1992b, pp. 3–6, 183ff.). Loosely, all offered intolerant descriptions of lawlessness or primitive forms of law supplanted by advanced, civilising legal practices. Their declarations of liberty and equality for all subjects belied how law contradictorily dispossessed, marginalised, plundered and enslaved those it framed as the other to its pronounced persons (Fitzpatrick, 1987; 1995b; 2001a). Indeed, the 'project of racialization' at the heart of modern law tied 'law to a particular community which excluded those whom law would include through race relations legislation' thus including racial groups as excluded social others through 'extensive racial strategies' (Fitzpatrick, 1987, pp. 130–131).

Several themes were woven into Fitzpatrick's richly textured work, including engagements with sovereignty (Fitzpatrick and Tuitt, 2004), Foucault on law (Golder and Fitzpatrick, 2009) and surveillance (Fitzpatrick and Kender, 2015), the social (Fitzpatrick, 1995a), provocations on popular justice (Fitzpatrick, 1988; 1992a), time, legal fiction, rules (Fitzpatrick, 2004b; 2001b, pp. 84ff.; 2004a) and the 'ineluctable instabilities' that nation, globalisation and imperialism shared with law to negotiate mutually sustaining 'irresolutions' (Fitzpatrick, 2001b). One might also note several prescient implications of his theorising for current moments of protest against racist police brutality. But let me end with brief reflections on what his work might mean for surpassing modern law and the relevance of legal pluralism, decolonisation and resurgence-reconciliation debates in places like Canada.

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First, by naming modern colonial law's muted myths, Fitzpatrick exposed its blinkered, contradictory and hierarchical race-based investitures. He also showed how this law ascended by negating an ambient legal pluralism in colonial contexts, asserting itself as a unified, superior law worthy of monopolistic jurisdiction over the realms it demarcated. Its capricious symbolic and material force cast existing juridical forms as inferior. However, the irresolution that grounded such law, despite its doggedly unifying fictions, prevented a thorough suppression of legal pluralism – hence repeatedly resurgent indigenous laws (Fitzpatrick, 2010). Fitzpatrick's work presciently gestured towards new political horizons, recognising multiple laws and grounds, and indeed processes for opening irresolvable legal grounds, rendering them continually scrutable – thus locating deconstruction at the foundations of legally plural contexts (Fitzpatrick, 2004b). The mythical grounds of all legal arrangements should, that is, be kept permanently exposed to problematisation; determinate rulings would then be openly silhouetted against promises of a mirage-like justice forever beyond the limits of given historical horizons.

Second, what critical genres might exceed colonial law's modern mythical grounds? Darian-Smith and Fitzpatrick (1999) engaged with post-colonial discourses in an attempt to decolonise modern legal practices (Fitzpatrick, 2008; 2010; 2014). If post-colonial thought could be considered 'integral' to political concepts of the West (nation states, imperialism, globalisation), its relation thereto was undecided:

> 'Postcolonialism, exists in an ambivalent belonging to the West. It speaks of the West and in a way comes from it. But postcolonialism is a disruption or fracturing of the West. It is not to be contained by the West. As such, it cannot be part of the west. It must speak from beyond the west that, in a sense, originates it.' (Darian-Smith and Fitzpatrick, 1999, p. 2)

The irresolution of post-colonial discourses suggests a critical gesture, but Fitzpatrick's (2014) explicit aim was to name the veiled grounds of modern occidental law. Enabled by, yet interrupting, Western idioms was the task of deconstructive engagements seeking to transcend occidental law. Clearly though, Fitzpatrick did not imagine a successive time period (as in 'after' the colonial), but rather ambivalent critiques directed to unmuting the quieted myths behind colonial law. In many ways, this genre of critique adds to Stoler's focus on 'the temporal and affective space in which colonial inequities endure and the forms in which they do so' (Stoler, 2016, p. i) and the tenacious persistence of the colonial in our lives today. Indeed, Fitzpatrick's complex attempt to unearth sedimented racialising myths of modern law signalled the ongoing effects of coloniality, welcoming new ways to enunciate the weighty stakes of decolonisation – whether pursued within or alongside post-colonial discourses.

Finally, several debates reflect upon Canada's decolonised futures through notions of indigenous reconciliation or resurgence (see Asch *et al.*, 2018). Fitzpatrick's (2001b) early engagements with these debates had important things to say about ways of addressing how to be *with* others. He too did not consider such issues as a matter of being for or against reconciliation or indigenous resurgence, but sought to develop – in a deconstructive way – the use of the term 'reconciliation' in fluid decolonising contexts. Thus, with reference to John Borrows, he noted that

> 'The verb "to reconcile" can impart being acceptingly reconciled to something, reconciled to one's fate for example. That is a meaning which operatively infects the noun "reconciliation" as it is judicially extracted from section 35 [of the Canadian Charter], a reconciliation of indigenous peoples to something that will always and ultimately require their submission. To what is complete and homogenous there can only be a reconciling to.' (Fitzpatrick, 2004c, p. 282)

He also signalled another way to approach this debate, recognising an impossibility that surrounds calls for reconciliation, resurgence or even reconciliation through resurgence, yet renders them possible. Fitzpatrick's (e.g. 2001b, pp. 73–9; 2006; 2010) interpretations of Derrida led him to see that

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what is ultimately irreconcilable provides shifting historical grounds upon which political calculations of rebirth and beginnings become possible. But his proviso in all this is clear:

> 'of such reconciliation there can be no end: it "is always to come" such that the "emplaced" positioning of any such calculations, that always displace, involves a basic reconciliation – decolonization becomes more than a process of reconciliation, or resurgence, but an integral feature of what we become, and so "of our very being".' (Fitzpatrick, 2004c, p. 282)

The existence of Fitzpatrick's important oeuvre, the nuance and depth of which cannot be captured in a brief paper, demonstrates precisely how to remain responsive to what is to come – to welcome that which is opaque in our engagements with extant vistas. I cannot imagine a more laudable way to surpass the concealed grounds of law, addressing them in the name of a justice that beckons interminably from horizons that are yet to form.

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